No. 92-896-CFX Title: Thunder Basin Coal Company, Petitioner
v.
Robert B. Reich, Secretary of Labor, et al.

Docketed: November 24, 1992 Court: United States Court of Appeals for the Tenth Circuit

Entry	Date	Proceedings and Orders
	Nov 24 1992	Petition for writ of certiorari filed.
	Dec 23 1992	Order extending time to file response to petition until January 27, 1993.
	Jan 27 1993	Order further extending time to file response to petition until February 17, 1993.
	Feb 17 1993	DISTRIBUTED. March 5, 1993
	Feb 17 1993	Brief of respondents Robert Reich, Secretary of Labor, et al. in opposition filed.
	Mar 8 1993	Petition GRANTED.
		**********
	Apr 14 1993	Order extending time to file brief of petitioner on the merits until May 10, 1993.
	May 10 1993	Joint appendix filed.
	May 10 1993	Brief of petitioner Thunder Basin Coal Co. filed.
	May 10 1993	Brief amici curiae of American Mining Congress, et al. filed.
	May 17 1993	Record filed.
	Jun 22 1993	Order extending time to file brief of respondent on the merits until July 1, 1993.
	Jun 23 1993	Brief amici curiae of International Union, et al. filed.
	Jul 1 1993	Brief of respondents Robert Reich, Secretary of Labor, et al. filed.
	Aug 2 1993	CIRCULATED.
	Aug 5 1993	Reply brief of petitioner filed.
	Aug 16 1993	SET FOR ARGUMENT TUESDAY OCTOBER 5, 1993. (2ND CASE).
	Aug 18 1993	Record filed.
	Oct 5 1993	ARGUED.

No. 92-896

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

THUNDER BASIN COAL COMPANY,
a Delaware corporation,

Petitioner,

v.

LYNN MARTIN, as Secretary of Labor, United States Department of Labor; WILLIAM J. TATTERSALL, as Assistant Secretary of Labor For Mine Safety and Health; WILLIAM HOLGATE, as District Manager of District No. 9, Coal Mine Safety and Health Administration of the United States Department of Labor; Mine Safety and Health Administration of the United States Department of Labor,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES W. NEWCOM
(Counsel of Record)
J. MARK BAIRD
SHERMAN & HOWARD
3000 First Interstate Tower North
633 17th Street
Denver, Colorado 80202
(303) 297-2900

THOMAS F. LINN
Atlantic Richfield Company
555 17th Street, 20th Floor
Denver, Colorado 80202
(303) 293-4234

WAYNE S. BISHOP
ACKERSON & BISHOP
1275 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20004
(202) 628-1100

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Tenth Circuit erred in holding, contrary to decisions of the Sixth and Fourth Circuits, that the Mine Safety & Health Act precludes federal district court jurisdiction to hear a challenge, on constitutional and federal question grounds, to an agency's application of the Mine Act which directly conflicts with a statutory right granted under a separate federal statute over which that agency has no jurisdiction.

2. Whether, in the absence of preclusionary statutory language, federal district courts have subject matter jurisdiction to hear pre-enforcement challenges on constitutional and federal question grounds to agency actions outside the domain of expertise of the enforcing agency.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. THE DECISION OF THE TENTH CIRCUIT IN THIS CASE DIRECTLY CONFLICTS WITH DECISIONS OF THE SIXTH AND FOURTH CIRCUITS HOLDING THAT SUBJECT MATTER JURISDICTION EXISTS IN FEDERAL DISTRICT COURTS TO RESOLVE CONSTITUTIONAL AND FEDERAL QUESTION CHALLENGES TO ADMINISTRATIVE ACTIONS UNDER THE MINE ACT	6
II. THE DECISION BELOW RAISES AN IMPORTANT AND RECURRING QUESTION CONCERNING FEDERAL DISTRICT COURT JURISDICTION TO HEAR A PRE-ENFORCEMENT CHALLENGE ON CONSTITUTIONAL AND FEDERAL QUESTION GROUNDS TO ADMINISTRATIVE ACTS WHERE THE ISSUE IN DISPUTE IS OUTSIDE THE DOMAIN OF EXPERTISE OF THE AGENCY INVOLVED	11
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 9, 10, 11, 12, 13

Bituminous Coal Operators Association, Inc. v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977) 6, 8, 9, 11

Central Hardware Co. v. NLRB, 407 U.S. 539 (1972) 13

Council of Southern Mountains, Inc. v. Donovan, 516 F. Supp. 955 (D.D.C. 1981) 11

Gardner v. Toilet Goods Association, 387 U.S. 167 (1967) 12

Hudgens v. NLRB, 424 U.S. 507 (1976) 13

Lechmere, Inc. v. NLRB, ___ U.S. ___, 112 S. Ct. 841 (1992) 13

Leedom v. Kyne, 358 U.S. 184 (1958) 12

Mathews v. Eldridge, 424 U.S. 319 (1976) 5, 11, 12

NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) 13

Rusk v. Cort, 369 U.S. 367, 379-80 (1962) 10

Secretary of Labor and UMWA v. Jim Walton Resources, 7 FMSHRC Dec. 1348 (1985), *affirmed* 822 F.2d 1134 (D.C. Cir. 1987) 13

Southern Ohio Coal Co. v. Donovan, 774 F.2d 693 (6th Cir. 1985), *amended* 781 F.2d 57 (6th Cir. 1986) 5, 6, 7, 8, 11

UMWA v. Peabody Coal, 7 FMSHRC Dec. 1357 (1985), *affirmed*, 822 F.2d 1134 (D.C. Cir. 1987) 13

Whitney National Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411, 85 S. Ct. 551, 13 L. Ed. 2d 386 (1965) 7

Ziegler Coal Co. v. Marshall, 502 F. Supp. 1326 (S.D. Ill. 1980) 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 2
28 U.S.C. §§ 2201-2202 2
29 U.S.C. § 141 3
30 U.S.C. § 801 3
30 U.S.C. § 816(a) 9
30 U.S.C. § 820(a) 4
30 U.S.C. § 820(b) 4
30 U.S.C. §§ 820(c), (d) 4

REGULATIONS

30 C.F.R. PART 40 4

No. _____

In The

Supreme Court of the United States

October Term, 1992

THUNDER BASIN COAL COMPANY,
a Delaware corporation,

Petitioner,

v.

LYNN MARTIN, as Secretary of Labor, United States Department of Labor; WILLIAM J. TATTERSALL, as Assistant Secretary of Labor For Mine Safety and Health; WILLIAM HOLGATE, as District Manager of District No. 9, Coal Mine Safety and Health Administration of the United States Department of Labor; Mine Safety and Health Administration of the United States Department of Labor,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Thunder Basin Coal Company[1] ("Thunder Basin") respectfully prays that a Writ of Certiorari issue

[1] Thunder Basin Coal Company, a wholly-owned subsidiary of Atlantic Richfield Company, has no subsidiaries.

to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

This case arises from decisions of the United States District Court for the District of Wyoming granting Thunder Basin's Motion for Preliminary Injunction (App. pp. 24-30) on March 21, 1991 and denying the Secretary of Labor's Motion to Dismiss (App. pp. 19-23) on May 20, 1991. The Judgment and Opinion of the Tenth Circuit (App. pp. 1-16), reversing the District Court's decisions, was entered on July 20, 1992. 969 F.2d 970 (10th Cir. 1992). Thunder Basin's timely Petition for Rehearing with Suggestion for Rehearing En Banc was denied on August 28, 1992 (App. pp. 17-18).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The district court's jurisdiction was invoked pursuant to 28 U.S.C. §§ 2201-2202 and 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Thunder Basin asserts a violation of the due process clause of the fifth amendment of the United States Constitution. The issues also present a conflict between two

federal statutes: the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 141, *et seq.*, and the Federal Mine and Safety Act of 1977 ("Mine Act"), 30 U.S.C. § 801, *et seq.* The provisions of the Mine Act involved appear in the Appendix (pp. 31-35).

STATEMENT OF THE CASE

Thunder Basin owns and operates the Black Thunder Mine near Wright, Wyoming. The mine began operations in 1977 and now has approximately 500 employees.

The United Mine Workers of America ("UMWA") has unsuccessfully sought to unionize the production employees of Thunder Basin. The employees rejected the UMWA by a vote of 307 to 56 in a National Labor Relations Board election in 1987, the only union election held among the mine's employees.

Thunder Basin does not recognize any union as a representative of its employees. It exercises its right under the LMRA to deny non-employee union organizers access to its property and records.

In October 1990, the UMWA initiated new tactics in its ongoing efforts to unionize the Black Thunder Mine. It sought to have itself and two of its staff organizers, neither of whom were employees of Thunder Basin, each designated under the Mine Act as a "representative of miners". This designation authorized the union and its employees serving as the "representative of miners," *inter alia*, to enter the mine premises, to review company

records, to request inspections and to participate in government inspections of the mine.[2]

Thunder Basin protested this designation to the Mine Safety and Health Administration ("MSHA") on the ground that it compromised Thunder Basin's LMRA rights to exclude non-employee union organizers from its premises and records. MSHA officials rejected Thunder Basin's protest, advising Thunder Basin by letter of March 11, 1991 that it must proceed to recognize the designation of the UMWA and its organizers as a "representative of miners."

Faced with the explicit threat of a citation, potential severe penalties and a long series of administrative and review proceedings in order to protect its right to exclude union organizers from its mine, Thunder Basin sought injunctive relief in federal district court.[3] The district

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[2] Designation as a "representative of miners" does not require or connote majority representation of a company's employees. As few as two mine employees may seek the designation of a representative of miners. 30 C.F.R. Part 40.

[3] Under the Mine Act, a mine operator may initiate the administrative hearing process only after receiving a citation. If a citation is upheld, a civil penalty of $50,000 must be assessed. 30 U.S.C. § 820(a). A further penalty of up to $5,000 may also be assessed for each day of noncompliance. 30 U.S.C. § 820(b). Criminal penalties may be imposed on individuals and the mining company. 30 U.S.C. § 820(c), (d).

Thunder Basin's refusal to accept the UMWA designation as representative of miners would, as MSHA acknowledged to the district court, result in a citation. A similar refusal at a mine adjacent to Thunder Basin, the Jacobs Ranch Mine of Kerr McGee, resulted in MSHA threatening the imposition of the maximum per day penalty then in effect during the pendency of the administrative proceedings. Kerr McGee capitulated under that threat. (App. pp. 13-14; Verified Complaint ¶30).

court found that the primary issues raised by Thunder Basin – MSHA's refusal to recognize important rights granted to Thunder Basin under the LMRA and MSHA's imposition of an administrative process subjecting Thunder Basin to "considerable fines and penalties" while Thunder Basin sought administrative review to protect its LMRA rights – presented matters of federal statutory conflict and constitutional due process which MSHA had "no expertise to resolve." (App. pp. 21, 28). The district court, relying on *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693 (6th Cir. 1985), *amended* 781 F.2d 57 (6th Cir. 1986), held that the Mine Act's judicial review provisions did not deprive it of subject matter jurisdiction to resolve these claims. The district court held, based on the authority of *Southern Ohio Coal* and *Mathews v. Eldridge*, 424 U.S. 319 (1976), that Thunder Basin did not have to exhaust its administrative remedies before a determination of the issues presented here, which it found were beyond the agency's domain of expertise. (App. p. 22). It granted the preliminary injunction and denied the government's motion to dismiss.

The Tenth Circuit reversed, specifically rejecting the Sixth Circuit's holding in *Southern Ohio Coal* and finding that the district court had no subject matter jurisdiction to hear a pre-enforcement challenge concerning the Mine Act.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE TENTH CIRCUIT IN THIS CASE DIRECTLY CONFLICTS WITH DECISIONS OF THE SIXTH AND FOURTH CIRCUITS HOLDING THAT SUBJECT MATTER JURISDICTION EXISTS IN FEDERAL DISTRICT COURTS TO RESOLVE CONSTITUTIONAL AND FEDERAL QUESTION CHALLENGES TO ADMINISTRATIVE ACTIONS UNDER THE MINE ACT.

The Tenth Circuit held that the district court had no subject matter jurisdiction to resolve a pre-enforcement challenge to administrative actions concerning the Mine Act. As the opinion of the Tenth Circuit acknowledges (App. p. 8), this holding is in direct conflict with the Sixth Circuit's decision in *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693 (6th Cir. 1985), *amended* 781 F.2d 57 (6th Cir. 1986). It also conflicts with the Fourth Circuit's decision in *Bituminous Coal Operators' Association, Inc. v. Secretary of Interior*, 547 F.2d 240 (4th Cir. 1977). Both Circuit Courts held that the Mine Act's judicial review provisions do not preclude federal district courts from hearing pre-enforcement challenges to agency actions involving federal questions outside the domain of expertise of the administrative agency.

In *Southern Ohio Coal*, a mine operator sought district court relief against an administrative procedure under the Mine Act requiring the operator, prior to any hearing, to reinstate miners previously terminated. The Sixth Circuit found the district court had subject matter jurisdiction to determine the pre-enforcement constitutional challenge to this process. The Court recognized that the Mine Act " . . . does not expressly preclude district court

jurisdiction." *Id.* at 700.[4] It referenced Supreme Court authority noting the unsuitability of administrative proceedings for the resolution of constitutional questions and, after recognizing that the Mine Act "does not expressly preclude district court jurisdiction," held that Congress had not precluded federal district court jurisdiction over important federal questions concerning the Act which were beyond the "domain of agency expertise." 774 F.2d at 700. It concluded:

> In *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 85 S. Ct. 551, 13 L. Ed. 2d 386 (1965), the Supreme Court explained that the purpose behind limited statutory review of administrative decisions is "to permit agency expertise to be brought to bear on particular problems." *Id.* at 420, 85 S. Ct. at 557. Thus, when the issue to be adjudicated is one that is within the domain of agency expertise, then the statutorily provided judicial review procedure is exclusive. Questions concerning the constitutionality of rules or statutes, however, are not the type of questions that are within an agency's domain of expertise. Rather, responsibility to deal with questions of constitutional interpretation lies in the federal courts, both at the trial and appellate levels.

Id.

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[4] The court in *Southern Ohio Coal* distinguished the Mine Act from statutes in which Congress clearly prohibited district court jurisdiction – demonstrating that Congress has used very different and clear language to manifest a specific intention to preclude the general jurisdiction of the district courts. *See Id.* at 700.

The Tenth Circuit here made no attempt to distinguish *Southern Ohio Coal*; instead, it expressly repudiated the conclusion and rejected each of the "three reasons" it characterized as "justifications" for the Sixth Circuit's finding. (App. p. 8). Specifically, the Tenth Circuit "rejected" *Southern Ohio Coal*'s finding that Congress had not precluded federal district court jurisdiction, concluding instead that judicial review of Mine Act controversies was exclusively restricted to courts of appeals after exhaustion of administrative proceedings. (App. p. 8). It also directly rejected *Southern Ohio Coal*'s determination that constitutional issues are outside the domain of agency expertise, finding that nothing in the Mine Act distinguishes between challenges based on constitutional as opposed to other grounds. (App. pp. 8-9). Finally, it flatly disagreed with *Southern Ohio Coal*'s conclusion that the administrative process was not adequate for the resolution of the constitutional question presented. (App. pp. 8-9). Accordingly, the Tenth Circuit totally repudiated the rationale of *Southern Ohio Coal* and found no subject matter jurisdiction existed in the district court. This determination is directly and irreconcilably in conflict with *Southern Ohio Coal*.

In *Bituminous Coal*,[5] mine operators brought a pre-enforcement challenge to a regulation making mine operators responsible for the Mine Act violations committed by the construction companies they engaged. The Fourth

[5] *Bituminous Coal* was brought and decided under the legislative predecessor to the Mine Act of 1977. The judicial review language in each statutory version regarding court of appeals review is essentially identical.

Circuit upheld the subject matter jurisdiction of the federal district court over this challenge. The Court rejected the government's argument that pre-enforcement review was prohibited by 30 U.S.C. § 816(a). It concluded that the "Act neither states nor implies" that the post-enforcement review procedure for citations and administrative orders provide the "exclusive procedure" for access to the courts. *Id.* at 243. It found that "other procedures," including pre-enforcement challenges, were "not precluded" by the statute and, citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-41 (1967), held that subject matter jurisdiction existed to hear the pre-enforcement challenge of the mine operators. *Id.*

The Tenth Circuit here reached a directly contrary result. It found a legislative intent to preclude pre-enforcement review, but it did so by relying on statutory language and legislative history relating only to post-enforcement judicial review procedures.[6] Not only does the Tenth Circuit's decision conflict directly with *Bituminous Coal*, but its rationale is inconsistent with *Abbott Laboratories*, 387 U.S. 136 (1967), where this Court was

[6] The legislative history of the 1977 Mine Act shows that Congress was cognizant of the Fourth Circuit decision in *Bituminous Coal*. The substantive aspect of the decision was cited with approval in the 1977 Mine Act legislative history. S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted* in 1977 U.S.C.C.A.N. 3401, 3414. Though Congress reassessed district court review of civil penalty orders issued after exhaustion of the administrative process, *Id.* at 44, it made no effort to prohibit pre-enforcement review permitted by *Bituminous Coal*.

"wholly unpersuaded" by the contention that the presence of a comprehensive post-enforcement review procedure for agency determinations evidenced a clear congressional purpose to bar district court jurisdiction over pre-enforcement challenges.[7] *Id.* at 141. Quite apart from the Tenth Circuit's misplaced reliance on the legislative history of the post-enforcement judicial review process, the Tenth Circuit's decision here is nothing more than a flat disagreement with the Fourth Circuit regarding the appropriate determination of legislative intent from the statutory language.

The Tenth Circuit's decision in this case directly conflicts with those of the Sixth and Fourth Circuits on the precise issue of federal district court subject matter jurisdiction over pre-enforcement challenges concerning the Mine Act.[8] This important issue has been the subject of

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[7] In *Abbott Laboratories*, this Court reaffirmed the presumption in favor of judicial review by holding that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 141 (*quoting Rusk v. Cort*, 369 U.S. 367, 379-80 (1962)). "[A]n aggrieved person will not be cut off [from judicial review] unless there is a persuasive reason to believe that such was the purpose of Congress." *Id.* at 140. The Court found that post-enforcement judicial review provisions "were simply intended to assure adequate judicial review of such agency decisions, and that their enactment does not manifest a congressional purpose to eliminate judicial review of other kinds of agency action." *Id.* at 144.

[8] Although the Tenth Circuit here did not directly address the issue of exhaustion of administrative remedies, the tenor of its decision was that the administrative remedies were adequate and should be exhausted. In that respect, as well, its decision conflicts with both the Sixth and Fourth Circuit determinations

conflicting decisions in the lower courts, as well. *Ziegler Coal Co. v. Marshall*, 502 F. Supp. 1326, 1330 (S.D. Ill. 1980) (finding jurisdiction existed); *Council of Southern Mountains, Inc. v. Donovan*, 516 F. Supp. 955, 959 (D.D.C. 1981) (finding no jurisdiction). This Court should grant certiorari to resolve the conflict.

II. THE DECISION BELOW RAISES AN IMPORTANT AND RECURRING QUESTION CONCERNING FEDERAL DISTRICT COURT JURISDICTION TO HEAR A PRE-ENFORCEMENT CHALLENGE ON CONSTITUTIONAL AND FEDERAL QUESTION GROUNDS TO ADMINISTRATIVE ACTS WHERE THE ISSUE IN DISPUTE IS OUTSIDE THE DOMAIN OF EXPERTISE OF THE AGENCY INVOLVED.

The decision below raises an important and recurring question of federal law – *i.e.*, the standard by which federal district courts may assert jurisdiction to resolve pre-enforcement challenges to controversies arising from an administrative process. This Court in numerous cases has affirmed district court jurisdiction to hear pre-enforcement challenges to administrative action despite the existence of a comprehensive legislative scheme for court of appeals review after complete administrative proceedings. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Gardner*

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directly holding that exhaustion was not required in the face of the constitutional and federal question claims that were outside the agency's expertise. *Southern Ohio Coal Co.*, 774 F.2d at 701-702; *Bituminous Coal Operators' Association*, 547 F.2d at 244.

v. Toilet Goods Association, 387 U.S. 167 (1967); *Leedom v. Kyne*, 358 U.S. 184 (1958).

In each of the above-referenced cases the Court recognized that Congress had provided a comprehensive judicial review process based upon complete administrative proceedings, agency determination and order, and subsequent review in the courts of appeals. In none was there a specific statutory reservation of federal question jurisdiction in the federal district courts. In each, however, the Court found district court jurisdiction in the absence of a clear and convincing congressional purpose to preclude federal district court jurisdiction.[9] *See Abbott Laboratories*, 387 U.S. at 139-141. In each, jurisdiction was recognized to prevent the deprivation of a legislative right or the imposition of a significant hardship. In each, exhaustion of administrative remedies was deemed unnecessary in the context of the potential hardship.

The decision of the Tenth Circuit below veers sharply from the guidance of these cases to the detriment of judicial fairness and efficiency and to the direct peril of Thunder Basin. The hardship to Thunder Basin and the federal questions presented in its challenge are as real and material as those affecting the challengers in the referenced cases.

Thunder Basin is challenging action by a government agency which seeks to deprive it of an important right granted by another federal law regulated by a separate federal agency. That right – to prevent nonemployee

[9] Indeed, in *Mathews*, this Court found jurisdiction even in the presence of congressional intent to deny jurisdiction.

union organizers from access to nonunion plant premises and records – is a right recognized and affirmed by this Court for nearly 40 years. *Lechmere, Inc. v. NLRB*, ___ U.S. ___, 112 S. Ct. 841 (1992); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Seeking to protect that right in an administrative proceeding before the Federal Mine Safety and Health Review Commission is an act of futility, for the Commission has previously declined to address issues arising under the LMRA.[10] Moreover, defending the right in an administrative proceeding would subject Thunder Basin to the risk of very substantial fines and penalties. The same administrative agency has already used the threat of such fines and penalties to force a mine adjacent to Thunder Basin to surrender the same LMRA rights Thunder Basin seeks to protect (*supra*, p. 4 n.3). The administrative demand for capitulation of an important legislatively-granted right, at the risk of substantial fines and penalties for non-capitulation, raises a significant question of fundamental fairness and due process. The district courts are, as this Court has noted, more appropriate for the efficient and competent resolution of those matters which are beyond the domain of expertise of the agencies. *Abbott Laboratories*, 387 U.S. at 154.

The conflict in the circuits shows that the issue presented here is recurring. It is important to determine

[10] *UMWA v. Peabody Coal*, 7 FMSHRC Dec. 1357 (1985) and *Secretary of Labor and UMWA v. Jim Walton Resources*, 7 FMSHRC Dec. 1348 (1985), *consolidated* and *affirmed*, 822 F.2d 1134 (D.C. Cir. 1987).

whether, and under what standards, federal district courts can hear pre-enforcement challenges which raise constitutional and other significant federal questions beyond the competence and domain of expertise of the agency involved. This case presents the issue squarely, and certiorari should be granted to resolve this issue now for the future benefit to judicial fairness, efficiency and economy.

CONCLUSION

Petitioner Thunder Basin respectfully prays that this Court grant a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

CHARLES W. NEWCOM
(COUNSEL OF RECORD)
J. MARK BAIRD
SHERMAN & HOWARD
3000 First Interstate Tower North
633 17th Street
Denver, Colorado 80202
(303) 297-2900

THOMAS F. LINN
ATLANTIC RICHFIELD COMPANY
555 17th Street, 20th Floor
Denver, Colorado 80202
(303) 293-4234

WAYNE S. BISHOP
ACKERSON & BISHOP
1275 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20004
(202) 628-1100

Counsel for Petitioner

TABLE OF CONTENTS – APPENDIX

Page

CONTENTS

Decision and Opinion of United States Court of Appeals for the Tenth Circuit entered on July 20, 1992 ..... App. 1

Order of United States Court of Appeals for the Tenth Circuit entered on August 28, 1992 .... App. 17

Order Denying Motion to Dismiss of the United States District Court for the District of Wyoming entered on May 20, 1990 ..... App. 19

Order Granting Preliminary Injunction of the United States District Court for the District of Wyoming entered on March 21, 1991 ..... App. 24

Selected statutes from Federal Mine and Safety Act of 1977 ..... App. 31

Selected regulations promulgated under Federal Mine and Safety Act of 1977 ..... App. 35

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

THUNDER BASIN COAL COMPANY, Plaintiff-Appellee, v. LYNN MARTIN, as SECRETARY, UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR, WILLIAM J. TATTERSALL, as ASSISTANT SECRETARY OF LABOR FOR MINE SAFETY & HEALTH; WILLIAM HOLGATE, as DISTRICT MANAGER COAL MINE SAFETY AND HEALTH, DISTRICT 9, MINE SAFETY AND HEALTH ADMINISTRATION, MINE SAFETY AND HEALTH ADMINISTRATION OF THE UNITED STATES DEPARTMENT OF LABOR, Defendants-Appellants.	)	No. 91-8029 (Filed Jul. 20, 1992)

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. 91-0050-B)

Colleen A. Geraghty, Attorney (David S. Fortney, Deputy Solicitor of Labor; Edward P. Clair, Associate Solicitor; W.

Christian Schumann, Counsel, Appellate Litigation, with her on the briefs) United States Department of Labor, Arlington, Virginia, for Defendants-Appellants.

Charles W. Newcom of Sherman & Howard, Denver, Colorado (Thomas F. Linn of Atlantic Richfield Company, Denver, Colorado, with him on the brief) for Plaintiff-Appellee.

Before LOGAN and TACHA, Circuit Judges, and COOK, District Judge.*

LOGAN, Circuit Judge.

Defendants-appellants, including the United States Secretary of Labor and the Mine Safety and Health Administration (MSHA), seek to overturn a preliminary injunction granted by the district court enjoining the Secretary of Labor from enforcing 30 C.F.R. pt. 40 against plaintiff-appellee Thunder Basin Coal Company (Thunder Basin). Although the parties discuss several issues concerning the propriety of the district court's grant of the preliminary injunction, we need address only one: whether the district court had subject matter jurisdiction to grant injunctive relief from enforcement of a regulation under Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"), 30 U.S.C. §§ 801, *et seq.*

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* The Honorable H. Dale Cook, Senior United States District Judge for the Northern District of Oklahoma, sitting by designation.

I

30 C.F.R. pt. 40 is a regulation issued under the Mine Act that establishes the procedure and administrative requirements for designation of a miner representative under the Act. *See* 30 U.S.C. § 813(f). The Mine Act requires frequent inspections of mines to gather and disseminate health and safety information and to determine compliance with health and safety standards. *Id.* § 813(a). A miner representative has the right to accompany the MSHA inspector on such inspections and the right to obtain an immediate inspection of the mine by MSHA if the representative has "reasonable grounds to believe that a violation of [the Mine Act] or a mandatory health or safety standard exists, or an imminent danger exists." *Id.* § 813(g)(1). The miner representative also enjoys other rights under the Mine Act. *See id.* § 819(b) (representative receives "copy of any order, citation, notice, or decision required by [the Mine Act]"); *id.* §§ 815(d), 817(e) (may contest issuance, modification, or termination of an order); *id.* § 813(f) (representative may participate in pre- or post-inspection conferences). Under the Mine Act, a miner representative may be a nonemployee of the mine being inspected. *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447, 450 (10th Cir. 1990) (interpreting § 813(f)).

Thunder Basin operates a large coal mine with a nonunion work force. Certain of Thunder Basin's employees, exercising their rights under the Mine Act,

designated two nonemployees to be their miner representatives.[1] These nonemployees of the mine were employees of the United Mine Workers of America (UMWA). Thunder Basin alleges that designation of the UMWA employees as miner representatives is an abuse of 30 C.F.R. pt. 40 because it is nothing more than a calculated attempt to forward the UMWA's efforts to unionize plaintiff's mine. Thunder Basin argues that requiring it to allow the UMWA employees access to its property and records in connection with an inspection violates its rights under the Labor Management Relations Act (LMRA), 29 U.S.C. § 141, *et seq.*, to exclude union employees from access to Thunder Basin's records and property. It further argues that its constitutional due process rights would be violated if it is forced to risk substantial penalties before the merits of its legal arguments are heard.

II

Whether a district court has subject matter jurisdiction is subject to de novo review. *See City of Chanute, Kan. v. Williams Natural Gas Co.*, 955 F.2d 641, 658 (10th Cir. 1992).

The federal district courts are courts of limited jurisdiction. *See, e.g., Finley v. United States*, 490 U.S. 545, 547-48 (1989); *City of Tacoma v. Taxpayers*, 357 U.S. 320, 336

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[1] As few as two miners may designate a mine representative. 30 C.F.R. pt. 40.1(b)(1). This provision helps assure representation of all miners, including members of minority groups and miners who may not be in total harmony with their co-workers.

(1958). Congress may grant review of actions taken under a specific statute to an administrative agency, rather than to federal district courts. *See Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419-20 (1965). "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984). Specifically in context of the Mine Act we have held that

> a legislative intent that district courts are not to exercise jurisdiction over particular matters may be implied by the context of an *entire* legislative scheme and that clear and convincing evidence of a legislative intent that district courts should not exercise jurisdiction over particular matters is sufficient to bar such jurisdiction, especially where other avenues of review are available.

American Coal Co. v. United States Dep't of Labor, Mine Safety & Health Admin., 639 F.2d 659, 662 (10th Cir. 1981) (citing with approval holding in *Bituminous Coal Operators' Ass'n v. Marshall*, 82 F.R.D. 350, 352 (D.D.C. 1979)) (emphasis in original).

The Mine Act provides an extensive review process for challenges to actions taken under the Act. The usual procedure when a company refuses to comply with 30 C.F.R. pt. 40 is that it receives a citation, *see* 30 U.S.C. § 814(a), then an order, *see id.* § 814(b), and a proposed assessment of penalty, *see id.* §§ 815(a), 820. A citation, order, or proposed assessment of penalty may be contested before an administrative law judge (ALJ), *id.*

§ 815(a)(d), and thereafter appealed to the Federal Mine Safety and Health Review Commission (the Commission) for its discretionary review. *Id.* § 823(d)(2)(A)(i). After exhausting these administrative remedies, the Mine Act allows appeal of the Commission's final decision to a United States court of appeals whose factual review is limited to the administrative record.[2] *Id.* § 816(a)(1).

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[2] 30 U.S.C. § 816(a)(1) states in relevant part:

> Any person adversely affected or aggrieved by an order of the Commission issued under this chapter may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court within 30 days following the issuance of such order a written petition praying that the order be modified or set aside. . . . Upon such filing, the court shall have exclusive jurisdiction of the questions determined therein, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside, in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. . . . [T]he jurisdiction of the court shall be exclusive and its judgment and degree [sic] shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of Title 28.

Id. (footnote omitted).

Thunder Basin, apparently to avoid a citation, order, and proposed assessment of penalty, filed a complaint in federal district court seeking an injunction. The district court granted a preliminary injunction preventing defendants from enforcing 30 C.F.R. pt. 40.[3] The district court found that the administrative review provided by the Mine Act was unnecessary in the instant case; that the agency has no special expertise to determine the alleged conflict between LMRA and MSHA or plaintiff's constitutional due process claim. *See* Order Denying Motion to Dismiss at 3-4, Appendix at 37-38.

This court, in *American Coal,* held that the Mine Act grants district courts subject matter jurisdiction in only the limited circumstances enumerated in 30 U.S.C. §§ 818, 820, and that actions taken under the Act should be challenged initially before the administrative agency in accordance with the administrative review procedures outlined in 30 U.S.C. § 816. *See* 639 F.2d at 660-62; *accord Council of S. Mountains, Inc. v. Donovan,* 516 F. Supp. 955, 959 (D.D.C. 1981); *United States Steel Corp. v. Marshall,* 471 F. Supp. 438 (W.D. Pa. 1979); *Bituminous Coal Operators' Ass'n v. Marshall,* 82 F.R.D. at 352-54. We based our holding on Congress' clear intent as evidenced by both the plain language of the Mine Act as a whole and the Act's

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[3] The preliminary injunction has now been made a final injunction. We have before us Thunder Basin's motion to stay our determination of the appeal of the preliminary injunction and for its consolidation with the appeal of the permanent injunction. Because the parties had ample opportunity to argue the dispositive jurisdictional issue, we deny the motion for stay and consolidation.

legislative history. 639 F.2d at 660. We reaffirm that holding today.

The district court's view, allowing subject matter jurisdiction of Mine Act claims alleging constitutional violations and statutory conflict, finds support in *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693, 700 (6th Cir. 1985), *amended*, 781 F.2d 57 (6th Cir. 1986). *Accord Zeigler Coal Co. v. Marshall*, 502 F. Supp. 1326, 1329-30 (S.D. Ill. 1980) (claim that § 815(c) violates plaintiff's constitutional due process rights may be determined by district court). In *Southern Ohio*, the Sixth Circuit held that district courts have jurisdiction to determine constitutionality of Mine Act rules and procedures, stating three reasons: (1) the Mine Act does not expressly deny district courts jurisdiction, 774 F.2d at 700; (2) "[q]uestions concerning the constitutionality of rules or statutes . . . are not the type of questions that are within an agency's domain of expertise," and therefore the purpose for requiring initial review by the administrative agency is not served, *id.*; and (3) there is a "distinction between claims arising under an act and claims concerning the act itself," *id.*

This court rejected the first of *Southern Ohio's* justifications in *American Coal*. *See* 639 F.2d at 661-62. As to the others, we note that the Mine Act, in granting jurisdiction to ALJs, the Commission, and the courts of appeals, does not limit the bases upon which a party may challenge a citation, order or proposed assessment; the Act does not distinguish between challenges to orders based on constitutional grounds or conflict with other statutes and challenges based on misapplication of the Act itself. The Commission has demonstrated that it will consider constitutional challenges to the Mine Act. *E.g.*, *Secretary of*

Labor, Mine Safety & Health Administration (MSHA) v. Richardson, 3 F.M.S.H.R.C. 8, 18-21 (1981) ("It is our belief that the judicial role of the Commission . . . permits the Commission to entertain constitutional objections to the underlying statute, especially where, as here, review in a United States court of appeals is available."), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982); *Secretary of Labor, Mine Safety & Health Admin. (MSHA) v. Alabama By-Products Corp.*, 4 F.M.S.H.R.C. 2128, 2129 (1982) (considering claim that regulation was unconstitutionally vague). ALJs and the Commission may not enjoy any special expertise enabling them to decide constitutional challenges to the Mine Act and construction of the Act with other laws, but review by the court of appeals is also part of the statutory scheme and that review is adequate to address both constitutional challenges and questions of conflict with other statutes. *See United States Steel*, 471 F. Supp. at 440 (Congress intended that constitutional and legal challenges to the Mine Act be heard by the courts of appeals and not the district courts); *Utah Power & Light*, 897 F.2d at 452 (following administrative appeals, court rejected argument that MSHA's interpretation of § 813(f) allowing nonemployee miner representatives violated operator's property rights).

Although we need not go beyond the precedent of *American Coal* and the language of the Act, we note that the Mine Act's legislative history lends special support to the view that Congress intended to strictly limit district courts' jurisdiction over Mine Act disputes. Among the motivations for enacting the Mine Act were concerns that the old laws did "not provide means to react quickly enough to newly manifested health hazards" and that

civil penalties were "paid much too long after the underlying violation to effectively induce meaningful operator compliance." S. Rep. No. 181, 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3408. The report specifically pointed to de novo trials in the district courts involving challenges to penalties as a reason for the delays and resulting inefficiencies under the prior laws.[4] In discussing the grant of jurisdiction to the courts of appeals, the report noted the "intention that penalty litigation move with no undue delay." *Id.* at 3440.

That Thunder Basin has not yet received a citation or proposed assessment of penalty is not controlling; the gravamen of Thunder Basin's case is a dispute over an anticipated citation and penalty. *See Bituminous Coal,* 82

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[4] The Senate report explains:

> The Committee firmly believes that to effectively induce compliance, the penalty must be paid by the operator in reasonably close time proximity to the occurrence of the underlying violation. A number of problems with the current penalty assessment and collection system interfere with this. Final determinations of penalties are not self-enforcing, and operators have the right to seek judicial review of penalty determinations, and may request a de novo trial on the issues in the U.S. District Courts. This encourages operators who are not predisposed to voluntarily pay assessed penalties to pursue cases through the elaborate administrative procedure and then to seek redress in the Courts. Since the District Courts are still reluctant to schedule trials on these cases, and the Department of Justice has been reluctant to pursue such cases in the courts, the matters generally languish at that stage, and the penalties go uncollected.

S. Rep. No. 181, 95th Cong., 1st Sess. 16 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3416.

F.R.D. at 351, 354 (finding no jurisdiction over preenforcement challenge). Operators may not avoid the Mine Act's administrative review process simply by filing in a district court before actually receiving an anticipated citation, order, or assessment of penalty. *Cf., e.g., Southern Pines Assocs. v. United States,* 912 F.2d 713 (4th Cir. 1990) (no preenforcement challenges to EPA action under Clean Water Act); *Union Elec. Co. v. EPA,* 593 F.2d 299, 304-05 (8th Cir.) (no preenforcement challenges to EPA action under Clean Air Act), *cert. denied,* 444 U.S. 839 (1979).

Permitting district court jurisdiction on the basis of claims of constitutional violations or conflict with other statutes would permit preemptive strikes that could seriously hamper effective enforcement of the Act, disrupting the review scheme Congress intended. Challenges to regulations and provisions under the Mine Act are easily characterized in constitutional terms and as conflicting with other statutes. *See, e.g., Utah Power & Light,* 897 F.2d at 452 (argument that allowing nonemployees walkaround rights under § 813(f) infringes property rights); *United States Steel,* 471 F. Supp. at 439 (plaintiff alleged that complaint involving the Mine Act arose under the Fourth, Fifth, Sixth and Eighth Amendments and Administrative Procedure Act); *Bituminous Coal,* 82 F.R.D. at 352 (plaintiff claimed, inter alia, that bulletin giving interpretations of § 813(f) was in violation of 5 U.S.C. § 553 and was unconstitutional).

III

We believe the Mine Act's review procedures are adequate to protect Thunder Basin's due process rights. A

party, by disobeying the Mine Act or a regulation and then challenging the citation, order, or proposed penalty, is only penalized if the party loses on the merits of its claim. Thus a full and adequate hearing is provided before any penalty actually is imposed. *See Nichiro Gyogyo Kaisha, Ltd. v. Baldrige,* 594 F. Supp. 80, 83 (D.D.C. 1984). Moreover, the Commission in determining the appropriate penalty must consider "the gravity of the violation," and "good faith . . . in attempting to achieve rapid compliance." 30 U.S.C. § 820(i). If a party, in good faith, violates a regulation or provision of the Mine Act that in no way endangers the safety of its miners and challenges, albeit unsuccessfully, the citation, order, or proposed penalty through the proper procedure, such a violation is unlikely to prompt or support a substantial penalty. *See Bituminous Coal,* 82 F.R.D. at 354 ("[I]t would seem improbable that stiff supplemental civil penalties would be imposed where a genuine interpretative question was raised as to section [813](f), a provision which normally is not absolutely vital to human health and safety."). The Commission itself has said as much in a case factually close to the one before us, based in part on representations by the Secretary of Labor. *See Secretary of Labor, Mine Safety & Health Admin. (MSHA) v. Mid-Continent Resources, Inc.,* 12 F.M.S.H.R.C. 949, 957 (1990).[5] In the instant case,

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[5] The opinion stated:

> Further, given the Secretary's assurance that, in the event of an operator's failure to abate an alleged violation of section 103(f) [30 U.S.C. § 813(f)], withdrawal of miners will not ordinarily occur, it should not be expected that she would take the more extreme enforcement action of attempting to threaten to impose civil penalties upon a noncompliant operator pursuant to section 110(b) of the Act, 30 U.S.C. § 820(b), or criminal penalties pursuant to section 110(d) of the Act, 30 U.S.C. [§] 820(d). We therefore believe that the fears in this regard expressed by counsel of Mid-Continent are not well-founded.

Secretary of Labor, Mine Safety & Health Admin. (MSHA) v. Mid-Continent Resources, Inc., 12 F.M.S.H.R.C. 949, 957 (1990).

the Secretary has made assurances that criminal penalties under these circumstances are unlikely. *See* Brief for the Secretary of Labor at 33-34. 30 U.S.C. § 820(d) imposes criminal penalties only in the event of a willful violation or knowing refusal to comply. *See Bituminous Coal,* 82 F.R.D. at 354 ("It should also be pointed out that an operator that pursued the prescribed route of review would in no way run the risk of criminal prosecution."); *see also Wagner Seed Co. v. Daggett,* 800 F.2d 310, 316 (2d Cir. 1986) (willful "traditionally is synonymous with bad faith").

Thunder Basin points to defendants' actions concerning another nearby mine operator facing the same factual situation as is before us. There operator Kerr McGee Coal Corporation was threatened with the possibility of maximum daily penalties under 30 U.S.C. § 820(b) if it did not abate the violation. *See* Appendix 242-46. Threats of such penalties in the face of a bona fide interpretive dispute are indeed troubling. Such daily penalties, however, may be constitutionally valid so long as the operator "is accorded adequate opportunity to challenge their assessment at the administrative level before payment must begin." *Duquesne Light Co. v. EPA,* 698 F.2d 456, 469-70 n.14 (D.C. Cir. 1983). Also, although imposition of such a

penalty was recommended by the district manager to the central office, whether central office actually approved the penalty is not clear; Kerr McGee abated the violation before the penalty was imposed. Appendix at 247. It seems questionable that either the Commission or a court of appeals would sustain a significant penalty on appeal even if approved by MSHA. *See* 29 C.F.R. § 2700.29(b) (ALJ and Commission not bound by penalty recommended by Secretary); *Sellersburg Stone Co. v. Federal Mine Safety & Health Review Comm'n*, 736 F.2d 1147, 1151-52 & n.11 (7th Cir. 1984) (same).

In any event, Thunder Basin may have the merits of its claims decided without risking substantial daily penalties. After receiving a citation it can abate the violation by complying, while proceeding with the appeals process. *See Bituminous Coal*, 82 F.R.D. at 354. Alternatively, if plaintiff chooses not to comply with an MSHA order, apparently it may still avoid risking daily penalties by pursuing an expedited hearing that requires only four days notice. *See* C.F.R. § 2700.52.

Further, we believe that a miner representative acting within the scope of his or her duties as defined in the Mine Act will not cause irreparable injury to plaintiff while plaintiff's litigation is pending. *See Utah Power & Light*, 897 F.2d at 452 ("the Act clearly spells out the purpose of a miners' representative's participation in an inspection"). We have no reason to assume that MSHA would allow the UMWA miner representatives to act beyond the scope of their rights outlined in the Mine Act.

We conclude that the review provided for by Congress is adequate and exclusive.[6]

Utah Power & Light, 897 F.2d at 447, relied upon by Thunder Basin, is in no way inconsistent with the result reached here. In *Utah Power & Light* we held that a miner representative need not be an employee of the mine under § 813(f). *Id.* at 452. We referenced a hypothetical situation in which a UMWA employee might be named a miner representative "for purposes unrelated to the Act's safety objectives and thereby constitut[ing] an inappropriate exercise of the UMWA's designation right under § [813](f)." *Id.* (citation omitted). We stated that if

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[6] In arguing that the administrative remedy is inadequate Thunder Basin relies in part upon *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967). In *Gardner* the Supreme Court permitted preenforcement judicial review of three regulations under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301, *et seq.* after finding that nothing in the Act precluded such review. *Id.* at 168. The Court found that refusal to comply in order to challenge the regulations would result in exposure to "extensive" penalties and subject plaintiffs to possible criminal, seizure or injunctive suits. *Id.* at 172. The Court also recognized the "disastrous impact of an announcement that [plaintiffs'] cosmetics ha[d] been seized as 'adulterated,' " *id.*, would have had upon plaintiffs' public good will. If plaintiffs did comply with the regulations and instead sought premarketing approval, the costs to plaintiffs allegedly would have been tens of millions of dollars. *Id.* at 173. Thus, the Court found that requiring compliance and foreclosing review at the preenforcement stage would inflict irreparable injury on plaintiffs. *Id.* at 173-74. In the instant case the threatened penalties and consequences of requiring postenforcement review are not nearly as severe as those in *Gardner*, and the alternative to risking significant penalties in the instant case would not result in irreparable injury to Thunder Basin.

§ 813(f) was being abused, an operator's solution would be to "take action against individual instances of abuse when it discovers them." *Id.* We did not suggest that a district court would be the proper forum for taking action against such abuse. Instead, the operator must follow the procedures outlined in the Act. It can raise its concerns with MSHA; if MSHA still believes the designation is appropriate and the operator refuses to comply, it can get a citation and raise the issues before the ALJ, the Commission and a court of appeals.

The judgment of the district court is VACATED, and the case is REMANDED with instruction to dismiss the action for lack of subject matter jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THUNDER BASIN COAL COMPANY,	)	
Plaintiff-Appellee,	)	No. 91-8029
v.	)	
LYNN MARTIN, as SECRETARY, UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR; WILLIAM J. TATTERSALL, as ASSISTANT SECRETARY OF LABOR FOR MINE SAFETY & HEALTH; WILLIAM HOLGATE, as DISTRICT MANAGER COAL MINE SAFETY AND HEALTH, DISTRICT 9, MINE SAFETY AND HEALTH ADMINISTRATION; MINE SAFETY AND HEALTH ADMINISTRATION OF THE UNITED STATES DEPARTMENT OF LABOR,	)	
Defendants-Appellant	)	

ORDER

Entered August 28, 1992

Before LOGAN and TACHA, Circuit Judges, and COOK, District Judge.*

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*Honorable H. Dale Cook, Senior United States District Judge for the Northern District of Oklahoma, sitting by designation.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for for [sic] rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

THUNDER BASIN COAL COMPANY, Plaintiff, vs. LYNN MARTIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, WILLIAM J. TATTTERSALL, as ASSISTANT SECRETARY OF LABOR FOR MINE SAFETY AND HEALTH; WILLIAM HOLGATE, as DISTRICT MANAGER, COAL MINE SAFETY AND HEALTH, DISTRICT 9, MINE SAFETY AND HEALTH ADMINISTRATION OF THE UNITED STATES DEPARTMENT OF LABOR, Defendants.	)	(Filed May 20, 1991) No. 91-CV-0050-B

ORDER DENYING MOTION TO DISMISS

This matter comes before the Court on defendants' Secretary of Labor and Mine Safety and Health Administration's motion to dismiss complaint. The Court, having considered the materials on file both in support of and in opposition to the motion, having considered the arguments of counsel, and being fully advised in the premises, FINDS and ORDERS as follows:

Discussion

A complete background of this case may be found in this Court's March 21, 1991 order granting preliminary injunction, and thus need not be reiterated here.

Defendants move to dismiss, arguing two main claims: 1) this Court lacks subject matter jurisdiction over this action, as the Mine Act, 30 U.S.C. § 801 *et seq.*, vests exclusive jurisdiction over alleged Mine Act violations in the Federal Mine Safety and Health Review Commission (Commission), and plaintiff therefore may seek redress through that administrative channel only; and 2) alternatively, plaintiff, by bringing the present action in this Court, has failed to exhaust its available administrative remedies, and must do so first before this Court may maintain jurisdiction.

In support of their claim that this Court lacks subject matter jurisdiction, defendants rely primarily on *American Coal Co. v. United States Dept. of Labor, et al.*, 639 F.2d 659 (10th Cir. 1981). In *American Coal*, a Mine Safety and Health Administration (MSHA) coal mine inspector cited a mine operator for a safety violation, and the operator brought an action for declaratory and injunctive relief in federal district court, which dismissed the complaint. On appeal, the Tenth Circuit held that "disputed cases arising under the new mine safety act" should be adjudicated first before one of the Commission's Administrative Law Judges; from the ALJ, an aggrieved party may appeal to the Commission, whose decision may in turn be reviewed by the United States Court of Appeals. *Id.* at 661. If this case only involved a violation or interpretation of a MSHA regulation, *American Coal* would require this Court

to dismiss this action. However, this dispute implicates more than merely a MSHA regulation.

Plaintiff's recurrent argument is that a conflict exists between the Labor Management Relations Act (LMRA) and MSHA, and that the Secretary of Labor's intended resolution of it through standard MSHA administrative procedures would violate plaintiff's procedural due process rights. Additionally, plaintiff argues that the Commission has no expertise to resolve a statutory conflict between MSHA and LMRA. Given such statutory conflict, and the allegation of a constitutional violation, plaintiff claims that this Court is the appropriate forum to resolve this matter. This argument is compelling.

This case presents issues of first impression in the Tenth Circuit. *Southern Ohio Coal Co. v. Donovan, et al.*, 774 F.2d 693 (6th Cir. 1985) is most analogous to the case at bar. In *Southern Ohio*, coal mine operators brought suit in district court, alleging that certain procedural requirements of MSHA violated their due process rights. On appeal, the Sixth Circuit held that the district court had properly exercised initial jurisdiction, as the administrative review process created by the Mine Act was inadequate to adjudicate constitutional challenges.

> Under the Mine Act, the courts of appeals and not the district courts have jurisdiction to review the Commission's orders. 30 U.S.C. § 816. *The Act, however, does not expressly preclude district court jurisdiction.* . . . [W]hen the issue to be adjudicated is one that is within the domain of agency expertise, then the statutorily provided judicial review procedure is exclusive. *Questions concerning the constitutionality of rules*

> *or statutes, however, are not the type of questions that are within an agency's domain of expertise. Rather, responsibility to deal with questions of constitutional interpretation lies in the federal courts, both at the trial and appellate levels.*

Id. at 700 (emphasis added).

Under *Southern Ohio,* the allegation of a constitutional violation alone would remove the matter from Commission review. In this case, plaintiff alleges both a due process violation and a statutory conflict between the LMRA and MSHA. If anything, this matter presents a more compelling case for the exercise of district court jurisdiction, as the added issue of statutory conflict further diminishes the value of any specific agency expertise which the Commission might provide.

Defendants' additional argument that plaintiff has failed to exhaust its administrative remedies is similarly unpersuasive. Under *Mathews v. Eldridge,* 424 U.S. 319 (1976), a party need not exhaust his administrative remedies prior to a district court entertaining constitutional challenges to an agency's procedures. Furthermore, the exhaustion doctrine is not implicated here, as "its purpose is to permit an administrative agency to apply its special expertise in interpreting relevant statutes and in developing a factual record without premature judicial intervention." *Southern Ohio,* 774 F.2d at 702. As the above discussion demonstrates, this matter involves issues which are beyond the purview of the Commission, and are thus best resolved by this Court.

For these reasons, the defendants' motion to dismiss complaint is DENIED.

THEREFORE IT IS

ORDERED that the defendants' motion to dismiss complaint be, and the same hereby is, DENIED.

Date this 17th day of May, 1991.

/s/ Clarence A. Brimmer, Jr.
CHIEF JUDGE,
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

THUNDER BASIN COAL COMPANY, Plaintiff, vs. LYNN MARTIN, as SECRETARY, UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR; WILLIAM J. TATTERSALL, as ASSISTANT SECRETARY OF LABOR FOR MINE SAFETY & HEALTH; WILLIAM HOLGATE, as DISTRICT MANAGER COAL MINE SAFETY AND HEALTH, DISTRICT 9, MINE SAFETY AND HEALTH ADMINISTRATION; MINE SAFETY AND HEALTH ADMINISTRATION OF THE UNITED STATES DEPARTMENT OF LABOR, Defendants.	)	NO. 91-CV-0050-B (Filed Mar. 21, 1991)

ORDER GRANTING PRELIMINARY INJUNCTION

This matter comes before the Court on plaintiff's motion for a temporary restraining order and request for preliminary and permanent injunction. The Court, having considered the materials on file both in support of and in opposition to the motion, having considered the arguments of counsel, and being fully advised in the premises, FINDS and ORDERS as follows:

Background

Plaintiff operates the Black Thunder Mine located east of Wright, Wyoming. In 1987, Black Thunder employees, voting under the provisions of the Labor Management Relations Act (LMRA), rejected United Mine Workers of America (UMWA) union representation by a vote of 307-56. Black Thunder remains today a nonunion mine.

However, under 30 C.F.R. Part 40, the regulations promulgated pursuant to the provisions of the Mine Safety and Health Act (MSHA), a "representative of miners" may be designated by as few as two or more miners. Such a representative has "walkaround" rights, and thus may accompany MSHA mine inspectors on their safety inspection of the mine operation. This representative of miners may be a nonemployee of the mine operator. *Utah Power and Light Co. v. Secretary of Labor*, 897 F.2d 447, 452 (10th Cir. 1990).

Two or more Black Thunder employees have apparently invoked this MSHA regulation, and designated a UMWA representative for walkaround purposes. This prompted plaintiff's present request for relief, as plaintiff claims the rejection of the UMWA by Black Thunder employees under the LMRA can not now be circumvented by the conflicting MSHA regulations which provide the UMWA with access and entry to Black Thunder facilities. Plaintiff therefore seeks both a temporary restraining order and a preliminary injunction restraining defendants from enforcing MSHA because of plaintiff's refusal to comply with 30 C.F.R. Part 40, pending a hearing and determination as to whether UMWA can be a

proper representative under 30 C.F.R. Part 40 without first having been elected as a representative under the LMRA.

Discussion

On March 11, 1991 plaintiff filed its verified complaint seeking preliminary and permanent injunctions, along with its separate motion for a temporary restraining order. The defendants were given notice of the hearing on the temporary restraining order, and counsel for both sides were present and offered argument and evidence at that hearing. The Court therefore will treat this as a motion for preliminary injunction pursuant to Fed. R. Civ. P. 65.

Preliminary Injunction

"The main purpose of a preliminary injunction is simply to preserve the status quo pending the outcome of the case." *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986) (citing *Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1185 (10th Cir. 1975)). The Court may issue a preliminary injunction if the plaintiff establishes:

> (1) substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest.

Hartford House, Ltd. v. Hallmark Cards, Inc., 846 F.2d 1268, 1270 (10th Cir. 1988) *cert. denied*, 109 S.Ct. 260 (1988) (citing *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980)). When the last three requirements are met, a movant may satisfy the likelihood of success on the merits requirement by raising serious questions going to the merits. *Tri-State*, 805 F.2d 351 (10th Cir. 1986) (citing *Otero Sav. & Loan Association v. Federal Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981)).

1. *Likelihood of success on the merits:*

The Tenth Circuit elaborated on this requirement in *Tri-State:*

> The Tenth Circuit has adopted the Second Circuit's liberal definition of the "probability of success" requirement. When the other three requirements for a preliminary injunction are satisfied, 'it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.'

Id. at 358 (quoting *Otero Sav. & Loan Association v. Federal Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981). Plaintiff does not claim it will succeed on the merits; instead, plaintiff raises the difficult question of how it is to act given the conflict between the LMRA and the regulations promulgated under MSHA, 30 C.F.R. Part 40. As neither party has directed this Court to any authority which construes this statutory conflict, it therefore appears as a matter of first impression to both this Court and the Tenth Circuit, and thus merits a full investigation.

2. *Irreparable injury to movant:*

Plaintiff has established that it will be forced to admit UMWA representatives to its facilities if 30 C.F.R. Part 40 is enforced. Plaintiff has also shown that the UMWA's alleged interest in mine safety and health may be merely a ruse for gaining entry to plaintiff's Black Thunder property to attempt union organization efforts. Such potential abuse of MSHA by the UMWA poses the risk of serious harm to plaintiff. Additionally, plaintiff has demonstrated that it will be subject to considerable fines and penalties, some levied on a daily basis, if it stands on its LMRA rights and refuses to post the UMWA representative designation. Plaintiff could seek administrative remedies, but only after a MSHA citation had issued, and would be forced to proceed through administrative channels while such penalties accrued. Given this situation, it is apparent that plaintiff may suffer irreparably without injunctive relief.

3. *Balancing of injuries:*

The nature and extent of plaintiff's injuries are outlined above. Defendants' claim they will be injured if this Court steps in and interrupts the administrative process which is, in their view, the only appropriate avenue to resolve this dispute. Defendants claim they will be injured by the precedent that will be set by such an interruption. Defendants also claim those Black Thunder miners who have made the UMWA designation will be injured if this Court denies them their right to their chosen representative. This Court is interrupting the normal administrative process precisely because this specific statutory conflict has not previously been addressed, and

administrative remedies are inadequate here. Defendants' concern over precedent must be subordinated to the substantive rights of the parties which are jeopardized by this unresolved conflict. As regards the individual miner's rights under MSHA to have their representative of choice, this Court is in no way limiting that right. While this preliminary injunction is in effect, the MSHA safety and health interests of these miners will be adequately addressed by those other non-UMWA representatives previously designated who have walkaround rights, and who thus may accompany mine inspectors. Additionally, this preliminary injunction is only meant to preserve the status quo pending a final resolution of the primary statutory conflict at issue; miners' rights to have UMWA walkaround representation are not permanently affected by this Court's order.

4. *Public interest:*

The overriding public interest consideration in this matter is the resolution of the statutory conflict between the LMRA and the regulations promulgated under the MSHA, 30 C.F.R. Part 40. As such, the public interest is best served by granting plaintiff's request for preliminary injunction pending a resolution of this conflict.

5. *Security:*

Pursuant to Fed. R. Civ. P. 65(c), plaintiff, as the applicant, must furnish security in such sum as the Court deems proper in order for the requested preliminary injunction to issue. The Court hereby sets this sum at one thousand dollars ($1,000.00), unsecured, and plaintiff shall forthwith post a signature bond in this amount with

this Court's registry for the payment of such costs and damages as may be incurred or suffered by any party.

THEREFORE IT IS

ORDERED that plaintiff's request for a preliminary injunction be, and the same hereby is, **GRANTED**, and defendants are hereby enjoined from enforcing 30 C.F.R. Part 40 against plaintiff until further order from this Court. It is further

ORDERED that plaintiff shall forthwith post a bond with this Court's registry as indicated above.

Dated this 21st day of March, 1991.

/s/ Clarence A. Brimmer, Jr.
CHIEF JUDGE,
UNITED STATES
DISTRICT COURT

FEDERAL MINE SAFETY AND HEALTH ACT OF 1977

§ 816. Judicial review of Commission orders

(a) Petition by person adversely affected or aggrieved; temporary relief

(1) Any person adversely affected or aggrieved by an order of the Commission issued under this chapter may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court within 30 days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of Title 28. Upon such filing, the court shall have exclusive jurisdiction of the proceeding and of the questions determined therein, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside, in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to

the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Commission may modify or set aside its original order by reason of such modified or new findings of fact. Upon the filing of the record after such remand proceedings, the jurisdiction of the court shall be exclusive and its judgment and degree[1] shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of Title 28.

* * *

§ 820. Penalties

(a) Civil penalty for violation of mandatory health or safety standards

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $50,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

(b) Civil penalty for failure to correct violation for which citation has been issued

Any operator who fails to correct a violation for which a citation has been issued under section 814(a) of this title within the period permitted for its correction may be assessed a civil penalty of not more than $5,000 for each day during which such failure or violation continues.

(c) Liability of corporate directors, officers, and agents

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 815(c) of this title, any director, officer, or agent of such corporation who knowingly authorized, order, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

(d) Criminal penalties

Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 814 of this title and section 817 of this title, or any order incorporated in a final decision issued under this subchapter, except an order incorporated in a decision under subsection (a) of this section or section 815(c) of this title, shall, upon conviction, be punished by a fine of not more

than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this chapter, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or both.

* * *

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30 C.F.R. PART 40 – REPRESENTATIVE OF MINERS

§ 40.1 Definitions.

As used in this Part 40:

(a) "Act" means the Federal Mine Safety and Health Act of 1977.

(b) "Representative of miners" means:

(1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act, and

(2) "Representatives authorized by the miners", "miners or their representative", "authorized miner representative", and other similar terms as they appear in the Act.

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(2)

FILED

FEB 17 1993

OFFICE OF THE CLERK

No. 92-896

In the Supreme Court of the United States

OCTOBER TERM, 1992

THUNDER BASIN COAL COMPANY, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JUDITH E. KRAMER
Deputy Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Counsel for Appellate Litigation

DEBORAH GREENFIELD
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the district court lacked jurisdiction to enjoin enforcement of a regulation promulgated pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.*, because that Act provides a comprehensive scheme of administrative and judicial review, and vests exclusive jurisdiction over judicial review actions in the courts of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967)	10, 15, 16, 17
American Coal Co. v. *United States Dep't of Labor*, 639 F.2d 659 (10th Cir. 1981)	4, 6, 11
Bender v. *Williamsport Area School District*, 475 U.S. 534 (1986)	8-9
Bituminous Coal Operators' Ass'n v. *Marshall*, 82 F.R.D. 350 (D.D.C. 1979)	11
Bituminous Coal Operators' Association v. *Secretary of Interior*, 547 F.2d 240 (4th Cir. 1977)	18
Block v. *Community Nutrition Institute*, 467 U.S. 340 (1984)	10, 11, 12
Brock v. *Roadway Express, Inc.* , 481 U.S. 252 (1987)	20
Califano v. *Sanders*, 430 U.S. 995 (1977)	9
City of Rochester v. *Bond*, 603 F.2d 927 (D.C. Cir. 1979)	13
City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958)	9
Connors v. *Amax Coal Co.*, 858 F.2d 1226 (7th Cir. 1988)	13, 14
Council of S. Mountains, Inc. v. *Donovan*, 516 F. Supp. 955 (D.D.C. 1981)	11
FTC v. *Standard Oil of California*, 449 U.S. 232 (1980)	10, 15
Gardner v. *Toilet Goods Association*, 387 U.S. 167 (1967)	15, 17

Cases—Continued:

	Page
Leedom v. *Kyne*, 358 U.S. 184 (1958)	16
Lujan v. *National Wildlife Federation*, 497 U.S. 871 (1990)	10, 21
Mathews v. *Eldridge*, 424 U.S. 319 (1976)	15, 21-22
Owen Equip. & Erection Co. v. *Kroger*, 437 U.S. 365 (1978)	9
Pacific Power & Light Co. v. *Bonneville Power Admin.*, 795 F.2d 810 (9th Cir. 1986)	11
Secretary of Labor, Mine Safety & Health Admin v. *Jim Walter Resources, Inc.*, 7 F.M.S.H.R.C. 1348 (1985), aff'd *sub nom. Brock* v. *Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987)	14
Southern Ohio Coal Co. v. *Donovan*, 774 F.2d 693 (1985), amended, 781 F.2d 57 (6th Cir. 1986)	5, 15, 18, 19, 20, 21, 22
Thunder Basin Coal Co. v. *Martin*, No. 91-CV-0050-B (D. Wyo. Mar. 13, 1992)	5
United Mine Workers of America v. *Peabody Coal Co.*, 7 F.M.S.H.R.C. 1357 (1985)	14
United States Steel Corp. v. *Marshall*, 471 F. Supp. 438 (W.D. Pa. 1979)	11
United States v. *Fausto*, 484 U.S. 439 (1988)	12
Utah Power & Light Co. v. *Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990)	2, 13, 18
Weinberger v. *Salfi*, 422 U.S. 760 (1975)	12
Whitney Bank v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965)	9, 11
Ziegler Coal Co. v. *Marshall*, 502 F. Supp. 1326 (S.D. Ill. 1980)	11
Statutes and regulations:	
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*:	
5 U.S.C. 702 (§ 10(a))	9
5 U.S.C. 703 (§ 10(b))	9
5 U.S.C. 704 (§ 10(c))	10
Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742	18

Statutes and regulations—Continued:

	Page
Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. 301 *et seq.*	16
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.*	2
30 U.S.C. 801(g)(1)	2
30 U.S.C. 813(a)	2
30 U.S.C. 813(f)	2, 4
30 U.S.C. 814(a)	3
30 U.S.C. 815(a)	3
30 U.S.C. 815(d)	3, 8
30 U.S.C. 816(a)(1)	3, 10
30 U.S.C. 817(e)	3
30 U.S.C. 818	11
30 U.S.C. 818(i)	14
30 U.S.C. 820	11
30 U.S.C. 823(d)(1)	3
30 U.S.C. 823(d)(2)(A)(i)	3
Labor Managment Relations Act of 1947, 29 U.S.C. 141 *et seq.*	4
28 U.S.C. 1331	9
29 C.F.R. 2700.52	8
30 C.F.R.:	
Pt. 40	4
Section 40.1(b)(1)	2, 10
Section 40.4	4
Miscellaneous:	
S. Rep. No. 181, 95th Cong., 1st Sess. (1977)	7, 12

In the Supreme Court of the United States

OCTOBER TERM, 1992

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THUNDER BASIN COAL COMPANY, PETITIONER

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ROBERT B. REICH, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 969 F.2d 970. The district court's orders (Pet. App. 19-30) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1992. A petition for rehearing was denied on August 28, 1992. Pet. App. 17-18. The petition for a writ of certiorari was filed on November 24, 1992. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. 801 *et seq.*, was enacted to establish "mandatory health or safety standards to protect the health and safety of the Nation's coal [and] other miners." 30 U.S.C. 801(g)(1). As part of the Act's enforcement scheme, the Secretary of Labor or his representatives are authorized to conduct "frequent" safety inspections of mines. 30 U.S.C. 813(a). The Act also provides miners with so-called "walkaround" rights, which give a "representative authorized" by the miners the opportunity to participate in any such inspections. 30 U.S.C. 813(f). The Secretary has issued a regulation that defines a "representative of miners" as "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act," 30 C.F.R. 40.1(b)(1), and the Tenth Circuit has held that a miner representative need not be an employee of the mine being inspected. *Utah Power & Light Co.* v. *Secretary of Labor*, 897 F.2d 447, 450 (1990) (per curiam). The Act generally limits the function of representatives to "aiding" safety inspections and "participat[ing] in pre- or post-inspection conferences held at the mine." 30 U.S.C. 813(f).[1] The Act does not

[1] The court of appeals described (Pet. App. 3) the functions of representatives as follows:

> A miner representative has the right to accompany the MSHA inspector on such inspections and the right to obtain an immediate inspection of the mine by MSHA if the representative has "reasonable grounds to believe that a violation of [the Mine Act] or a mandatory health or safety standard exists, or an imminent danger exists." [30 U.S.C.] § 813(g)(1). The miner representative also enjoys other rights under the Mine Act. *See id.* § 819(b) (representative receives "copy of any order, citation, notice, or decision required by [the Mine Act]"); *id.* §§815(d), 817(e) (may contest issuance, modification, or termination of an order); *id.* § 813(f) (representative may participate in pre- or post-inspection conferences).

authorize other activity by representatives while they are at the mines.

If the Secretary determines that a violation of the statute or regulations promulgated under it has occurred, the Act authorizes him to issue a citation to the mine operator, 30 U.S.C. 814(a), and to propose the assessment of civil penalties, 30 U.S.C. 815(a). A mine operator may contest a citation and proposed penalty in a hearing before an administrative law judge (ALJ). 30 U.S.C. 815(a), 815(d), 823(d)(1). If a mine operator is dissatisfied with the ALJ's decision, it may seek discretionary review before the Federal Mine Safety and Health Review Commission (Commission). 30 U.S.C. 823(d)(2)(A)(i).

The Act provides a right of judicial review once the Commission has reached a decision. A mine operator "adversely affected or aggrieved by an order of the Commission * * * may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit." 30 U.S.C. 816(a)(1). Once an aggrieved party files for judicial review, the Act provides that "exclusive jurisdiction of the proceeding" rests in the court of appeals. *Ibid.*

2. Petitioner operates a coal mine near Wright, Wyoming. Pet. App. 25. In October 1990, some of its miners designated two employees of the United Mine Workers of America (UMWA), who do not work at petitioner's mine, as their "representatives" who are to observe safety inspections at the mine. See 30 U.S.C. 813(f); 30 C.F.R. Pt. 40. In 1987, the UMWA had sought unsuccessfully to become the collective bargaining representative of the miners under the Labor-Management Relations Act (LMRA), 29 U.S.C. 141 *et seq.* See Pet. 3; Pet. App. 4. After refusing to post notice of the miners' designation of UMWA personnel as their inspection representatives as required by regulation, see 30 C.F.R. 40.4, petitioner filed the present action in district court seeking to enjoin the Secretary from enforcing the inspection regulations, 30 C.F.R. Pt. 40, at its mine. Petitioner alleged that enforcement would violate its right under the LMRA to deny the union access to its property and records, and would violate due process. Pet. App. 22, 25. Petitioner filed the action in anticipation of a citation or proposed penalty for failure to comply with the regulations, but in fact no such citation or proposed penalty has ever issued. *Id.* at 7, 10.

3. The district court granted a preliminary injunction, enjoining the Secretary from enforcing the mine inspection regulations in a manner that would permit UMWA personnel to enter petitioner's property. Pet. App. 24-30. Subsequently, the court denied respondents' motion to dismiss for lack of subject matter jurisdiction and failure to exhaust administrative remedies. *Id.* at 19-23. Acknowledging that the Tenth Circuit's decision in *American Coal Co.* v. *United States Dep't of Labor*, 639 F.2d 659 (1981), held that

district courts lack jurisdiction to resolve disputes under the Mine Act, the court nonetheless concluded that the circumstances of this case justified an exception to that rule. Because petitioner raised a constitutional claim and a claim that the Mine Act conflicts with another federal statute, the district court concluded that it had jurisdiction. Pet. App. 21. The court relied on *Southern Ohio Coal Co.* v. *Donovan*, 774 F.2d 693 (1985), amended, 781 F.2d 57 (6th Cir. 1986), which it characterized as holding that "the administrative review process created by the Mine Act was inadequate to adjudicate constitutional challenges" like petitioner's. Pet. App. 21. Finally, the district court concluded that petitioner was not required to exhaust its administrative remedies before raising a constitutional challenge to agency action. *Id.* at 22.

After trial, the court concluded, without addressing petitioner's due process claim, that it was unreasonable and would conflict with the LMRA for the Secretary to permit miners to designate union personnel as representatives under the Mine Act. See *Thunder Basin Coal Co.* v. *Martin*, No. 91-CV-0050-B (D. Wyo. Mar. 13, 1992). The court accordingly entered a permanent injunction barring the Secretary from enforcing his regulations in a manner that would require petitioner to permit union personnel to gain access to its mine.

4. The court of appeals vacated the injunction and remanded with instructions to dismiss the case for lack of subject matter jurisdiction.[2] Pet. App. 1-16.

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[2] After the district court ruled in petitioner's favor on the merits, the Secretary filed an appeal. *Martin* v. *Thunder*

After tracing the Mine Act's "extensive review process for challenges to actions taken under the Act," *id.* at 5, the court of appeals concluded that "Congress' clear intent, as evidenced by both the plain language of the Mine Act as a whole and the Act's legislative history," compelled the conclusion that the statutory review process is exclusive. *Id.* at 7-8, citing *American Coal*, 639 F.2d at 660. It therefore reaffirmed its prior holding in *American Coal*, 639 F.2d at 660-662, that challenges to agency action under the Mine Act must be pursued via the administrative review process because the Mine Act grants subject matter jurisdiction to the district courts "in only the limited circumstances enumerated in 30 U.S.C. §§ 818, 820." Pet. App. 7. Thus, the district court lacked jurisdiction to consider petitioner's complaint.

The court also rejected petitioner's contention that the statutory review process was inadequate. The court reasoned that the Mine Act "does not limit the bases upon which a party may challenge a citation, order or proposed assessment," and does not "distinguish between challenges to orders based on constitutional grounds or conflict with other statutes and challenges based on misapplication of the Act itself." Pet. App. 8. In fact, the Commission routinely considers constitutional issues. *Id.* at 8-9. While acknowledging that the Commission may not "enjoy any special expertise" over such matters, the court found review in the court of appeals "adequate to address both constitutional challenges and questions of conflict with other statutes." *Id.* at 9.

Basin Coal Co., No. 92-8030 (10th Cir.). On July 20, 1992, the court of appeals issued a show cause order why that appeal should not be dismissed for want of jurisdiction in light of its decision in this case. The court subsequently dismissed the appeal in No. 92-8030 on jurisdictional grounds, and stayed its mandate in that case pending the filing and disposition of a petition for a writ of certiorari in this case.

Although "the precedent of *American Coal* and the language of the Act" sufficed for its holding, the court of appeals nonetheless found "special support" in the Act's legislative history, which shows that Congress enacted the statute in part because predecessor laws had failed to provide swift enforcement mechanisms. Pet. App. 9-10. Among the causes of delay were provisions for de novo trials in district courts over penalty assessments, and concerns over that delay prompted Congress to express its intention that "penalty litigation [under the Act] move with no undue delay." *Id.* at 10, citing S. Rep. No. 181, 95th Cong., 1st Sess. 8 (1977). It made no difference, the court reasoned, that petitioner had not received a citation or notice of proposed penalty, since "the gravamen of [the] case is a dispute over an anticipated citation and penalty." Pet. App. 10. The court observed that "[c]hallenges * * * under the Mine Act are easily characterized" in constitutional terms, and allowing district court jurisdiction based only on the presence of an asserted constitutional challenge would "permit preemptive strikes that could seriously hamper effective enforcement of the Act." *Id.* at 11.

Finally, the court held that the statutory review procedures adequately protected petitioner's due process rights. Pet. App. 11. Because a party who disobeys a Mine Act regulation and challenges an

ensuing citation is penalized only after losing on the merits, "a full and adequate hearing is provided before any penalty actually is imposed." *Id.* at 12. Even if petitioner were exposed to substantial fines and penalties, the statute provides an "adequate opportunity to challenge their assessment at the administrative level before payment." *Id.* at 13. The court also noted that petitioner could avoid significant fines either by abating the violation while challenging the citation, or by requesting an expedited hearing if it remained in noncompliance. *Id.* at 14; see also 30 U.S.C. 815(d); 29 C.F.R. 2700.52. The court doubted that the UMWA representatives would be permitted "to act beyond the scope of their rights outlined in the Mine Act" and thereby cause irreparable harm to petitioner during the pendency of litigation. Pet. App. 14. Thus, the court concluded that "the review provided for by Congress is adequate and exclusive." *Id.* at 15.

ARGUMENT

The court of appeals correctly held that the district court lacked subject matter jurisdiction because the Mine Act provides a review scheme vesting exclusive jurisdiction over cases like the present one in the courts of appeals.

1 a. Petitioner contends (Pet. 11-12) that the Mine Act's review scheme, triggered by the issuance of a citation and culminating in appellate court review, evinces no intent to preclude district court jurisdiction over this dispute. That contention is without merit. As the court of appeals noted (Pet. App. 4-5), district courts have jurisdiction only as granted by Congress. *E.g.*, *Bender* v. *Williamsport Area School*

Dist., 475 U.S. 534, 541 (1986); *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978). Although 28 U.S.C. 1331 grants the district courts general federal question jurisdiction, Congress remains empowered to bypass the district courts by vesting jurisdiction in administrative agencies with judicial review in the courts of appeals. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965).[3] Congress has enacted precisely such a scheme in the Mine Act.

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[3] Although 28 U.S.C. 1331 provides general federal question jurisdiction, that statute does not create a cause of action for petitioner. Any cause of action petitioner may have, rather, is created by Section 10(a) of the Administrative Procedure Act (APA), 5 U.S.C. 702. That provision creates a cause of action for persons "suffering legal wrong because of agency action" or who are "adversely affected or aggrieved by agency action within the meaning of the relevant statute." Although the courts below did not address the point, other provisions of the APA compel the conclusion that the district court did not have jurisdiction over petitioner's claim.

Section 10(b) of the APA, 5 U.S.C. 703, sets forth the form and venue of the cause of action created in Section 10(a). Cf. *Califano* v. *Sanders*, 430 U.S. 99 (1977) (holding that the judicial review provisions of the APA do not constitute a separate grant of jurisdiction to the district courts). Section 10(b) requires that judicial review of agency action proceed pursuant to "the special statutory review proceeding relevant to the subject matter in a court specified by statute" (in this case, the relevant court of appeals after conclusion of administrative proceedings, as provided by the Mine Act), unless the statute's review procedures are inadequate. 5 U.S.C. 703. As we argue below (and as the court of appeals' persuasive analysis demonstrates, see Pet. App. 14-15), judicial review in the court of appeals is plainly adequate. Accordingly, by the plain terms

The Act provides an elaborate and comprehensive administrative review scheme, followed by a right of judicial review in the court of appeals,[4] that leaves no room for residual district court jurisdiction. See *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 349 (1984); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967). Moreover, the Act carves out limited exceptions to its otherwise mandatory administrative review scheme, specifying that the district courts have jurisdiction over actions by the Secretary seeking injunctive or other appropriate relief to gain compliance with orders of the

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of the APA itself, petitioner has no federal cause of action in district court.

Moreover, even if the Mine Act's review scheme were inadequate, the APA still would not create a cause of action for petitioner under the circumstances of this case. When the inadequacy of the statutory review process is invoked as the basis for judicial review, Section 10(c) of the APA limits the availability of judicial review to "final agency action." 5 U.S.C. 704. The Secretary has not, however, taken any final action with respect to petitioner. Petitioner's challenge is not to the facial validity of the definition of "representative" in 30 C.F.R. 40.1(b)(1), but only to an interpretation of the rule that would permit union personnel to act as representatives. The Secretary has not taken any final action against petitioner pursuant to such an interpretation, and the APA accordingly does not authorize judicial review in any event. See *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 890-894 (1990). Indeed, even the issuance of a citation would not constitute final agency action within the meaning of the APA. *FTC* v. *Standard Oil Co. of California*, 449 U.S. 232, 239-243 (1980).

[4] Once an aggrieved party invokes his right of judicial review, the statute specifically provides that the jurisdiction of the courts of appeals is "exclusive." 30 U.S.C. 816(a)(1).

Commission. 30 U.S.C. 818, 820. See also Pet. App. 7; accord *American Coal*, 639 F.2d at 661; *Pacific Power & Light Co.* v. *Bonneville Power Admin.*, 795 F.2d 810, 814 (9th Cir. 1986) (where statute differentiates between matters subject to district and appellate court jurisdiction, that scheme is exclusive). In light of the comprehensiveness of the administrative review scheme, Congress's action in specifying certain limited circumstances in which the district courts have jurisdiction over Mine Act disputes is strong evidence that Congress did not intend the district courts to have jurisdiction over other causes of action arising under the Act. See *Block* v. *Community Nutrition Institute*, 467 U.S. at 347. Thus, the court of appeals was correct in concluding that permitting pre-enforcement district court jurisdiction in the face of the Act's comprehensive post-enforcement review scheme would defeat the very "effectiveness of the statutory design." *Whitney Nat'l Bank*, 379 U.S. at 420.[5]

The court of appeals was also correct in concluding (Pet. App. 5) that the Mine Act's legislative history indicates that Congress did not intend for district courts to have jurisdiction over pre-enforcement Mine Act disputes. As the Tenth Circuit stated in *American Coal*, Congress intended "[t]he Commis-

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[5] A number of district courts have also concluded that the Mine Act's exclusive review procedures deny them jurisdiction to resolve disputes under the statute. *Council of S. Mountains, Inc.* v. *Donovan*, 516 F. Supp. 955 (D.D.C. 1981); *United States Steel Corp.* v. *Marshall*, 471 F. Supp. 438 (W.D. Pa. 1979); *Bituminous Coal Operators' Ass'n* v. *Marshall*, 82 F.R.D. 350 (D.D.C. 1979). But see *Ziegler Coal Co.* v. *Marshall*, 502 F. Supp. 1326 (S.D. Ill. 1980).

sion [to] serve[] as the ultimate administrative review body for disputed cases arising under the new mine safety act." 639 F.2d at 661, citing S. Rep. No. 181, 95th Cong., 1st Sess. 13 (1977). The Senate Report noted that the purpose of providing a comprehensive administrative review scheme, without jurisdiction over enforcement disputes in the district courts, was to avoid delays and inefficiency in enforcing the statute's health and safety measures. Pet. App. 10 & n.4; see also S. Rep. No. 181, *supra*, at 45-46. Petitioner's claim that district court jurisdiction is nonetheless appropriate is at odds with the congressional decision in 1977 to amend the statute to *divest* district courts of jurisdiction over Mine Act disputes. The statute's legislative history thus provides further evidence—"fairly discernible in the statutory scheme," *United States* v. *Fausto*, 484 U.S. 439, 452 (1988), citing *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984)—of Congress's intent to vest exclusive jur-isdiction in the court of appeals.

b. Nothing about the nature of petitioner's claims justifies deviating from the statutory review scheme. Although petitioner has couched its claims in terms of due process and conflict with another federal statute, the merits of this case involve only the question whether the term "representative" under the Act and its implementing regulations includes employees of a union in a non-union mine.

The Commission has the expertise to decide that statutory issue, and the jurisdiction and competence to adjudicate any constitutional claims that may be raised, in the normal course of its proceedings pursuant to the Mine Act's administrative review scheme. Cf. *Weinberger* v. *Salfi*, 422 U.S. 760 (1975).

Moreover, the Commission's resolution of these legal issues is subject to judicial review in the courts of appeals. In fact, the Commission has already held, in a ruling affirmed by the Tenth Circuit, that a "representative" under the Mine Act need not be an employee of the mine. *Utah Power & Light*, 897 F.2d at 450 (statute imposes no "limitation on the employment status of the representative").[6] The Commission currently has under consideration a case raising the same issue petitioner has raised. *Kerr-McGee Coal Corp.*, FMSHRC Docket No. WEST 91-84-R (argued Nov. 19, 1992). Accordingly, there can be no doubt that the scheme established by Congress does provide petitioner with an opportunity to obtain judicial resolution of the very issues it sought to adjudicate in the district court.[7]

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[6] That case did not, however, raise the particular statutory question raised in this case—whether the term "representative" under the Act includes a union employee at a non-union mine.

[7] In addition, it would be destructive of the statutory scheme not to permit the Commission to resolve this dispute as an initial matter. The courts of appeals have recognized that "[t]he policy behind having a special review procedure in the first place * * * disfavors bifurcating jurisdiction over various substantive grounds between district court and the court of appeals," *City of Rochester* v. *Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979), and that the mere presence of a claim of a conflict between federal statutes is therefore insufficient to justify forgoing the administrative process altogether. See *Connors* v. *Amax Coal Co.*, 858 F.2d 1226, 1231 (7th Cir. 1988) (Benefits Review Board has jurisdiction to resolve case involving federal common law claims and claims under Employee Retirement Income Security Act, as well as under Black Lung Benefits Act); *Bond, supra* (Federal Aviation Administration, and not district court, has jurisdiction to resolve alleged conflict

As the court of appeals noted, it is not difficult to phrase a routine challenge to administrative action in constitutional terms. In fact, this case is an example. Petitioner's due process claim apparently is that it is constitutionally entitled to litigate its claim without the risk that it will be penalized if it loses. That claim is implausible on its face.

A litigant always risks adverse consequences if it loses in litigation. The presence of some litigation risk, however, does not raise due process concerns.[8] Petitioner cites cases assertedly supporting its due process theory, but those cases are inapposite. In the

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between Federal Aviation Act and National Environmental Policy Act). As the court of appeals noted (Pet. App. 9), although the Commission may not possess expertise with respect to the LMRA, judicial review in the court of appeals ensures that any issues arising under that Act will receive independent judicial scrutiny. "The focus is not on the agency's familiarity with particular legal questions, but on its ability to produce the kind of record that will permit adequate appellate review of the questions." *Connors*, 858 F.2d at 1231. Moreover, contrary to petitioner's assertion (Pet. 13), the Commission has in the past been willing to consider whether actions arguably prohibited by the LMRA also violate the Mine Act. See, *e.g.*, *United Mine Workers of America* v. *Peabody Coal Co.*, 7 F.M.S.H.R.C. 1357, 1364-1365 (1985); *Secretary of Labor, Mine Safety & Health Admin.* v. *Jim Walter Resources, Inc.*, 7 F.M.S.H.R.C. 1348, 1354 (1985), aff'd *sub nom. Brock* v. *Peabody Coal Co.*, 822 F.2d 1134, 1146-1148 (D.C. Cir. 1987).

[8] Petitioner overstates the degree of litigation risk to which it is exposed. The Mine Act requires the Commission to take account of a party's good faith in assessing civil penalties, see 30 U.S.C. 818(i), and, as the court of appeals noted, petitioner could abate any violation pending review or seek an expedited hearing once a citation issued. See Pet. App. 14; see also note 11, *infra*.

due process cases upon which petitioner relies, see *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Southern Ohio Coal Co.* v. *Donovan*, 774 F.2d 693 (1985), amended, 781 F.2d 57 (6th Cir. 1986) a party was subject to a pre-hearing deprivation—that is, deprivation of a property or liberty interest *before* a meaningful hearing—that caused an irreparable injury that could not be cured by a post-hearing remedy. Because a "claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing," *Mathews* v. *Eldridge*, 424 U.S. at 331, petitioner must show not only a pre-hearing deprivation of a liberty or property interest, but also that the deprivation cannot be cured by a post-hearing remedy. Petitioner's claim meets neither condition. In sharp contrast to the situation in *Mathews*, petitioner is not subject to any pre-hearing deprivation of a liberty or property interest. Petitioner is not required to pay any fines or take any action prior to the conclusion of the proceedings. And even if petitioner were somehow damaged by the mere pendency of administrative proceedings, any such damage would not be irreparable. See *FTC* v. *Standard Oil Co. of California*, 449 U.S. at 244. See also note 11, *infra*; Pet. App. 14-15 & n.6. Petitioner's due process claim is therefore entirely without merit.

c. Petitioner invokes this Court's decisions in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), and *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967), in arguing (Pet. 11-12) that the hardships it will suffer if it is forced to incur an administrative citation before gaining judicial review militate in

favor of district court jurisdiction.[9] Those cases, however, provide no support for petitioner's jurisdictional argument.

In *Abbott Laboratories*, certain drug manufacturers brought an action in district court challenging the validity of a regulation promulgated under the Federal Food, Drug, and Cosmetic Act (Drug Act), 21 U.S.C. 301 *et seq.*, without first waiting for the regulation to be enforced. This Court concluded that the district court had jurisdiction over such pre-enforcement challenges to regulations under the Drug Act, finding that the language and legislative history of the statute established that Congress intended for district courts to have jurisdiction over such claims. *Abbott Laboratories*, 387 U.S. at 141-148. In so holding, the Court rejected the government's argument that because the statute explicitly provided for pre-enforcement review of certain types of regulations, it precluded the same type of review for other kinds of regulations. *Id.* at 141. Rather, after analyzing "the context of the entire legislative scheme," *ibid.*, the Court concluded that the Drug

[9] Petitioner also relies (Pet. 12) on this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958). *Leedom*, however, is not at all like this case. In *Leedom*, an action in district court was the only means "within [petitioner's] control * * * to protect and enforce" its statutory rights, and the administrative review process was therefore inadequate. 358 U.S. at 190. Here, petitioner can trigger the Mine Act's administrative review process simply by challenging a citation. Moreover, although the legality of the Secretary's regulation has been challenged in this case, there can be no plausible allegation, as was uncontested in *Leedom*, that the agency action at issue was facially *ultra vires*. 358 U.S. at 185.

Act evinced a congressional intent *not* to eliminate judicial review over the regulations at issue. *Id.* at 144.[10]

Unlike the Drug Act cases, however, where the Court found a "congressional purpose" to permit pre-enforcement review in the district court, *Abbott Laboratories*, 387 U.S. at 141-142, no such congressional purpose can be found in the Mine Act. To the contrary, as we have argued, *supra* at 8-12, the language, structure and history of the Mine Act compel the conclusion that Congress did not intend for the district courts to exercise jurisdiction over pre-enforcement disputes.[11]

[10] In *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967), the Court concluded that the district court had jurisdiction over a pre-enforcement challenge to other regulations pro-mulgated under the Drug Act. Citing *Abbott Laboratories*, the Court did not find it necessary separately to analyze the jurisdictional issue. See *Toilet Goods Ass'n*, 387 U.S. at 168.

[11] Relying on *Abbott Laboratories* and *Toilet Goods Ass'n*, petitioner points (Pet. 11-14) as a basis for district court jurisdiction to the hardships that it will suffer if it does not gain pre-enforcement review. The discussion in those cases to which petitioner refers, however, relates *not* to the question of jurisdiction, but rather to the completely separate questions of ripeness and exhaustion. See *Abbott Laboratories*, 387 U.S. at 148-156; *Toilet Goods Ass'n*, 387 U.S. at 170-174.

In any event, as the court of appeals concluded (Pet. App. 14-15 & n.6), there is no basis for petitioner's contention that it will suffer irreparable harm if it is forced to adhere to the Mine Act review process. Although penalty assessments may mount in the face of noncompliance, the Mine Act affords petitioner a "full and adequate" hearing before the violation is established and any penalty is actually imposed. Pet. App. 12. Moreover, even if petitioner complies with the Secretary's order during the review process and thus permits union

2. Petitioner claims (Pet. 6-8) that the decision in this case conflicts with the decision of the Sixth Circuit in *Southern Ohio Coal Co.* v. *Donovan*, 774 F.2d 693 (1985), amended, 781 F.2d 57 (1986), and that this Court's review is necessary to resolve that conflict.[12] In *Southern Ohio Coal*, the court upheld a district court's assumption of jurisdiction over a due

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personnel to function as representatives, there is no basis other than speculation for petitioner's claim that the presence of union personnel in that capacity will cause it injury. See *id.* at 14-16. If union personnel acting as representatives exceed their statutory role under the Mine Act, the Act's administrative scheme remains the appropriate avenue for challenging such conduct. *Id.* at 15-16, citing *Utah Power & Light*, 897 F.2d at 452. There is no reason to believe the Commission would not act appropriately in limiting the conduct of the representatives in such circumstances.

Thus, contrary to petitioner's suggestion (Pet. 10 n.8), even if there were jurisdiction in the district court, there would be no basis for excusing petitioner's failure to exhaust its administrative remedies.

[12] Petitioner also claims (Pet. 8-9) that the decision below conflicts with the Fourth Circuit's decision in *Bituminous Coal Operators' Ass'n* v. *Secretary of Interior*, 547 F.2d 240 (1977). That decision, however, predated the substantial changes in the Act's review scheme that in part provided the basis for the decision below. *Bituminous Coal* arose under the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (1969). As the court below emphasized (Pet. App. 10 & n.4), that statute was superseded by the Mine Act in 1977, which was enacted in part because Congress thought it necessary to narrow the availability of district court review. Since its consideration of the pre-1977 statute in *Bituminous Coal*, the Fourth Circuit has not had occasion to decide a case under the quite different judicial review scheme enacted in the Mine Act.

process challenge to a rule promulgated under the Act. Because of the particular nature of the constitutional claim in that case, the Sixth Circuit held that the Act's comprehensive administrative and judicial review scheme was not exclusive of the district court's general federal question jurisdiction. Although there is some tension between *Southern Ohio Coal* and the decision below, it is not clear that the rationale of *Southern Ohio Coal* would permit a district court in the Sixth Circuit to assume jurisdiction over a due process claim like petitioner's. And the *Southern Ohio Coal* court expressed no view whatever on petitioner's principal claim in this case —that the district court had jurisdiction to resolve a purported conflict between the Mine Act and another federal statute. We therefore do not believe that whatever tension exists between *Southern Ohio Coal* and the decision below is sufficient to require this Court's review.

At issue in *Southern Ohio Coal* was a regulation that required mine operators to reinstate, pending the outcome of the administrative review process, terminated miners who made a "non-frivolous" claim that their termination was in retaliation for reporting safety violations at a mine. The mine operators claimed that it violated due process for the Secretary not to provide "any pre-deprivation hearing whatsoever before granting temporary reinstatement" to miners terminated for exercising their rights under the statute. 774 F.2d at 698. Whatever the outcome of the administrative proceedings—*i.e.*, whether or not the termination at issue was upheld—the mine operator was injured by being forced to employ a miner who it had determined should be fired

without any hearing to determine whether the firing was justified.[13] That injury, moreover, could not be cured by a post-hearing remedy, because the mine operators' challenge had no connection to the merits of the particular dispute before the Commission. The "injury is present regardless of whether the miners' complaints ultimately are sustained or denied." 774 F.2d at 699.[14] The Sixth Circuit accordingly held that the mine operators' claim could appropriately be brought in district court because their injury was "irremediable by the statutorily-prescribed method of review." 774 F.2d at 701.[15]

The situation in the present case is far different from that in *Southern Ohio Coal*. The mere issuance

[13] The threshold determination whether the miner's claim of retaliation was "non-frivolous" was made ex parte by the Secretary without any possibility of input by the mine operator. 774 F.2d at 704.

[14] In fact, the lack of any connection between the operators' claims and the merits of the decision to terminate any particular miner saved *Southern Ohio Coal* from mootness. In that case, the mine operators and miners had settled the particular disputes that gave rise to the case, but the court held that the case was not moot, precisely because the procedures employed by the Secretary—requiring reinstatement while administrative proceedings were pending without a meaningful pre-deprivation hearing—injured the mine operators in any event. 774 F.2d 699-700.

[15] On the merits, the *Southern Ohio Coal* court concluded that the Secretary's reinstatement procedures violated due process. This Court's later decision in *Brock* v. *Roadway Express, Inc.*, 481 U.S. 252 (1987), which concluded that due process did not require a pre-deprivation hearing under a parallel reinstatement scheme in another federal statute, effectively repudiated that holding.

of a Mine Act citation stemming from petitioner's refusal to permit union personnel to act as representatives under the Mine Act would not, in itself, cause petitioner any injury (much less irreparable injury) without the opportunity for any meaningful hearing.[16] To the contrary, petitioner is not required to pay any fines or take any action prior to the conclusion of the administrative review process, and is entitled to judicial review in the court of appeals if it is aggrieved by the Commission's decision. As the court of appeals explained, the Mine Act affords petitioner "a full and adequate hearing * * * *before* any penalty actually is imposed." Pet. App. 12 (emphasis added). Thus, while the Sixth Circuit in *Southern Ohio Coal* characterized the mine operators' due process allegation as a "bona fide claim[] against the procedure adopted by the Secretary," 774 F.2d at 701, the claim in this case does not meet even the threshold requirement of a procedural due process claim under *Mathews* v. *Eldridge*—that the claim "rest[] on the proposition

[16] The fact that no citation has ever issued, and no final agency action has ever been taken against petitioner, provides an additional distinction between this case and *Southern Ohio Coal*. The challenge in *Southern Ohio Coal* was to the facial validity of a regulation that required immediate action on the part of the mine operator, and the issuance of the final rule provided the requisite final agency action required by the APA. See *Lujan* v. *National Wildlife Federation*, 497 U.S. at 891-892. As we have explained, see note 3, *supra*, in the present case there has been no final agency action and the APA accordingly does not provide a basis for petitioner's cause of action.

that full relief cannot be obtained at a postdeprivation hearing." 424 U.S. at 331.

Unlike the claims in *Southern Ohio Coal*, petitioner's claim in this case is inextricably connected to the merits of the claim it could have brought before the Commission pursuant to the Mine Act's administrative review process. In fact, the two claims are identical. If petitioner is correct that the term "representative" under the Act cannot include union personnel, then petitioner will prevail in its administrative challenge to any citation that may issue. By contrast, jurisdiction in *Southern Ohio Coal* depended on the *lack* of connection between the mine operators' claims and the merits of any particular case. The *Southern Ohio Coal* court noted that "[h]ad the dispute been over the merits of the miners' complaints then the district court would have lacked jurisdiction in the first instance because of exclusive jurisdiction in the courts of appeals to review the Commission's decision on the merits." *Southern Ohio Coal*, 774 F.2d at 698-699 n.6.

In sum, because the jurisdictional holding in *Southern Ohio Coal* depended on the unusual nature of the mine operators' claims in that case, and because those claims were entirely different from petitioner's claims in the present case, *Southern Ohio Coal* would not have compelled a different result had this case been brought in the Sixth Circuit. Indeed, *Southern Ohio Coal* did not even address the question of jurisdiction over petitioner's principal claim—that the LMRA requires the conclusion that the term "representative" under the Mine Act cannot include union personnel at a non-union mine. There is

accordingly no conflict in the circuits requiring this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JUDITH E. KRAMER
Deputy Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Counsel for Appellate Litigation

DEBORAH GREENFIELD
Attorney
Department of Labor

FEBRUARY 1993

FILED
MAY 10 1993
OFFICE OF THE CLERK

No. 92-896

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

THUNDER BASIN COAL COMPANY,
a Delaware corporation,
Petitioner,
v.

ROBERT B. REICH, Secretary of Labor,
United States Department of Labor, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

CHARLES W. NEWCOM *
J. MARK BAIRD
SHERMAN & HOWARD
3000 First Interstate Tower North
633 17th Street
Denver, Colorado 80202
(303) 297-2900

THOMAS F. LINN
ATLANTIC RICHFIELD COMPANY
555 17th Street, 20th Floor
Denver, Colorado 80202
(303) 293-4234

WAYNE S. BISHOP
ACKERSON & BISHOP
1275 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20004
(202) 628-1100
Counsel for Petitioner

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel for Respondents

* Counsel of Record

PETITION FOR CERTIORARI FILED NOVEMBER 24, 1992
CERTIORARI GRANTED MARCH 8, 1993

52 PP

EDITOR'S NOTE

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TABLE OF CONTENTS

	Page
Relevant Docket Entries	
United States District Court for the District of Wyoming	1
United States Court of Appeals for the Tenth Circuit	3
Verified Complaint, with Exhibits	6
Exhibit 2	21
Exhibit 6	24
Exhibit 7	25
Exhibit 8	27
Exhibit 9	29
Exhibit 10	31
Exhibit 11	34
Exhibit 12	36
Exhibit 13	39
Exhibit 14	40
Exhibit 15	42
Exhibit 16	44
Transcript of Hearing on Motion for Preliminary Injunction	46
Letter from William Holgate to J. A. Herickhoff, dated March 11, 1991 (Exhibit "C")	49

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Docket No. 91-0050

Case Filed 03-11-91

THUNDER BASIN COAL COMPANY

v.

LYNN MARTIN, as Secretary,
United States Department of Labor, *et al.*

RELEVANT DOCKET ENTRIES

Date	Docket No.	Proceedings
03/11/91	1	VERIFIED COMPLAINT for declaratory judgment and injunctive relief
03/11/91	2	MOTION for issuance of a temporary restraining order
• • •		
03/13/91	6	deft Secretary of Labor, Mine Safety & Health Administration's RESPONSE to motion for TRO
• • •		
03/13/91	8	brief in support of motion for issuance of a TRO and preliminary injunction
03/14/91	9	REPLY to Secretary of Labor
• • •		
03/14/91	11	Deft's MOTION to dismiss
• • •		
03/21/91	14	ORDER granting preliminary injunction; ordered that defts are hereby enjoined from enforcing 30 C.F. R. Part 40 against pltf until further order from this Court; ORDERED that pltf shall forthwith post a bond with this court's registry in the amount of ($1,000) unsecured. (cab) mld 3-22-91

Date	Docket No.	Proceedings
03/22/91	15	ANSWER BRIEF in opposition to MSHA's motion to dismiss
• • •		
03/29/91	—	TRANSCRIPT of motion for temporary restraining order
• • •		
04/25/91	22	ANSWER of defts Secretary of MSHA
• • •		
05/20/91	25	ORDER denying motion to dismiss. (cab) mld 5/20/91
05/20/91	26	NOTICE of appeal by defts of order granting preliminary injunction entered on 3/21/91
• • •		

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-8029

Filed: 5/31/91

THUNDER BASIN COAL

v.

MARTIN, *et al.*

Appeal from United States District Court
for the District of Wyoming

RELEVANT DOCKET ENTRIES

Date	Docket No.	Proceedings
05/31/91	1	[514671] Civil case docketed. Preliminary record filed. Transcript order form due 6/10/91 for C. Frederick Cole pursuant to R.42.1 Docketing statement due 6/10/91 for Mine Safety and, for William Holgate, for William J. Tattersall, for LABR, for Lynn Martin Notice of appearance due 6/10/91 for Richard A. Stacy, for Margaret A. Miller, for Edward P. Clair, for Robert P. Davis, for Colleen A. Geraghty, for Thomas A. Nicholas, for Charles W. Newcom (lwb) [91-8029]
• • •		

Date	Docket No.	Proceedings
10/04/91	26	[547735] Appellant's brief filed by Lynn Martin, LABR, William J. Tattersall, William Holgate, Mine Safety and. Original and 7 copies. c/s: y. Served on 10/2/91 Oral argument? Y., Appendix filed. Original and 1 appendix copy. Appellee/Respondent's brief due 11/4/91 for Thunder Basin (lwb) [91-8029]
11/04/91	27	Appellee's brief filed by Thunder Basin. Original and 7 copies. c/s: y. Served on 11/4/91 Oral Argument? n. Appellant's optional reply brief due 11/21/91 for Lynn Martin (kas) [91-8029]
11/29/91	29	[556696] Appellant's reply brief filed by Lynn Martin, LABR, William J. Tattersall, William Holgate, Mine Safety and. Original and 7 copies. c/s: y (jtp) [91-8029]
12/20/91	32	[560564] Appellant's supplemental authority filed by Lynn Martin, LABR, William J. Tattersall, William Holgate, Mine Safety and. Original and 3 copies. c/s: y (jtp) [91-8029]
01/06/92	33	[562441] Hearing set for March 1992 Session, at Denver. (sls) [90-4192 91-1029 91-1114 91-1310 91-3028 91-8029 91-9010]
03/10/92	35	[578338] Case argued and submitted to Judges Logan, Tacha, Cook. (sls) [91-8029]
03/19/92	38	[580945] Appellee's supplemental authority filed by Thunder Basin. Original and 4 copies. c/s: y (jtp) [91-8029]
• • •		

Date	Docket No.	Proceedings
07/20/92	42	[608062] Terminated on the Merits after Oral Hearing; Vacated and Remanded; Written, Signed, Published. Logan, authoring judge; Tacha; Cook. [91-8029] (Motion to stay and consolidate appeal with 92-8030 is denied.) (mt) [91-8029]
07/31/92	43	[610921] Petition for rehearing en banc [91-8029] filed by Thunder Basin in 91-8029. Original and 12 copies. c/s: y (kc) [91-8029]
• • •		
08/28/92	46	[616834] Order filed by Judges Logan, Tacha & Cook denying Petition for rehearing en banc [610921-1] (mt) [91-8029]
• • •		
12/04/92	53	[638401] Order filed by Judges ENBANC the order of 8/28/92 is reissued nunc pro tunc to show the en banc panel. Parties served by mail. (mt) [91-8029]
01/19/93	54	[647818] Petition for writ of certiorari filed on 11/24/92 by Appellee Thunder Basin in 91-8029. Supreme Court Number 92-896. (lwb) [91-8029]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Civil Action No. 91 CV 0050B

THUNDER BASIN COAL COMPANY,
Plaintiff,

v.

LYNN MARTIN, as SECRETARY, UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR; WILLIAM J. TATTERSALL, as ASSISTANT SECRETARY OF LABOR FOR MINE SAFETY & HEALTH; WILLIAM HOLGATE, as DISTRICT MANAGER COAL MINE SAFETY AND HEALTH, DISTRICT 9, MINE SAFETY AND HEALTH ADMINISTRATION; MINE SAFETY AND HEALTH ADMINISTRATION OF THE UNITED STATES DEPARTMENT OF LABOR,
Defendants.

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

[Filed March 11, 1991]

COMES NOW Thunder Basin Coal Company ("Thunder Basin"), by and through its attorneys, and complains and alleges as follows:

I. JURISDICTION AND VENUE

1. This action is for declaratory and injunctive relief. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 2201-2202 and 28 U.S.C. § 1331 because this controversy arises under the laws of the United States, more particularly, under the Labor-

Management Relations Act, as amended, 29 U.S.C. § 141 *et seq.* ("LMRA"), and the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 801 *et seq.* ("Mine Act"), and the Constitution of the United States.

2. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (e) in that the claims in this action arise in this judicial district.

II. PARTIES

3. Plaintiff Thunder Basin is a corporation duly incorporated under the laws of the State of Delaware, with its principal place of business located twelve miles southeast of Wright, Wyoming, mailing address P.O. Box 406, Wright, Wyoming 82732.

4. Defendant Lynn Martin is the Secretary of the United States Department of Labor. The Mine Safety and Health Administration ("MSHA") is an Administration within the United States Department of Labor, which was established by Section 302(a) of the Mine Act, which Administration enforces the Mine Act in behalf of the Secretary of Labor. Defendant William J. Tattersall is the Assistant Secretary of Labor for Mine Safety and Health and thus is in charge of and directs personnel within MSHA. Defendant William Holgate is the District Manager of Coal Mine Safety and Health, District 9, of MSHA. Thunder Basin's mines are located in District 9 and Mr. Holgate directs enforcement activity in District 9. Hereafter Defendants are collectively referred to as MSHA or Defendants.

III. NATURE OF DISPUTE

5. MSHA is seeking to require Thunder Basin to waive its rights under the LMRA and to recognize the United Mine Workers of America ("UMWA") as a representative of Thunder Basin employees, even though those employees have previously rejected the UMWA as a representative in a secret ballot election under the LMRA by a vote of 307-56. If no relief is awarded in this action,

MSHA will force Thunder Basin to either waive its statutory rights under the LMRA or incur civil and perhaps criminal penalties (for individuals and the corporation) for violating the Mine Act.

IV. STATEMENT OF FACTS

A. *Thunder Basin*

6. Thunder Basin is a coal mining company. It operates the Black Thunder Mine, which is the largest surface coal mine in the United States, and the Coal Creek Mine. The Black Thunder Mine is located approximately twelve miles southeast of Wright, Wyoming. The Coal Creek Mine is located approximately twenty-five miles northeast of Wright, Wyoming.

7. This dispute involves the Black Thunder Mine. That mine began production in 1977. The Black Thunder Mine currently has approximately 500 employees.

8. Since it began operations in 1977, the Black Thunder Mine, as the Coal Creek Mine, has at all times been a non-union mine. Thunder Basin has had one union election, pursuant to the provisions of the LMRA. That election occurred in late 1987. At that time, the UMWA sought to represent the production and maintenance employees at the Thunder Basin's Black Thunder and Coal Creek Mines. Thunder Basin employees rejected the UMWA by a vote of 307-56. Thus both mines remained and continue to this day to be non-union mines. Since that election, no additional petitions for representation of employees at the Thunder Basin's mines, pursuant to the applicable provisions of the LMRA, 29 U.S.C. § 159, have been filed by the UMWA or any other union.

B. *LMRA, Mine Act—Conflict in Provisions*

9. Before a union can represent employees under the LMRA, the union must comply with the detailed substantive and procedural rules established by the National

Labor Relations Board under the LMRA. Congress has clearly stated the purpose and policy of the LMRA. It is, among other things, "to prescribe the legitimate rights of both employees and employers in their relations" with each other. 29 U.S.C. § 141(b).

10. The National Labor Relations Board has set, among other things, procedures for determining whether an election will be held among employees, what employees will be eligible to vote, how elections will be conducted, what election campaign tactics are appropriate, and how disputes as to the representative status of a union are to be addressed. *See* National Labor Relations Board Case Handling Manual (Part 2), Representation Proceedings.

11. Case law of the National Labor Relations Board and the courts further addresses when, if ever, a union may gain access to company property. While a union representative who is not an employee often has access to company property after an election in conjunction with the pursuit of the union's duty to bargain collectively in behalf of employees, such a union representative is never allowed to go into working areas (as it would in a mine safety inspection under the Mine Act) during the election process or as a part of organizing efforts.

12. Under LMRA election procedures, employers are allowed to refuse to disclose any information regarding company operations or practices to a union during an election campaign.

13. Under the Mine Act, MSHA has promulgated regulations, 30 C.F.R. Part 40, which provide for the designation of a "Representative of Miners." Exhibit 1 hereto. That term is defined as "[a]ny person or organization which *represents* two or more miners at a coal or other mine for purposes of the Act." 30 C.F.R. § 40.1 (b)(1) (emphasis added).

14. In contrast to LMRA election procedures, once an organization is determined to be a Representative of

Miners under the Mine Act, it is entitled to substantial participation in the affairs of a mining company. A Representative of Miners may designate persons to accompany an inspector on mine property during an inspection and participate in pre- and post-inspection conferences. 30 U.S.C. § 813(f). It may request inspections. 30 U.S.C. § 813(g). It may initiate proceedings to modify the application of regulations at the mine it "represents" and participate as a party in those proceedings. 30 C.F.R. Part 44. It is to be sent copies of all citations, orders, notices or decisions which MSHA gives the mine operator. 30 U.S.C. § 819(b). It is to receive and can comment upon a mine operator's training plans. 30 C.F.R. §§ 48.3, 48.23. It can challenge the issuance, modification or termination of certain enforcement actions taken against a mine operator by MSHA and can contest the reasonableness of the time period MSHA gives a mine operator to correct an alleged violation of the Mine Act or MSHA's regulations. 30 U.S.C. §§ 815(d), 817(e). Federal Mine Safety and Health Review Commission rules allow a Representative of Miners to participate as a party, with discovery rights, etc., in proceedings under the Mine Act. 29 C.F.R. § 2700.4.

15. A union, such as the UMWA, which has never been certified pursuant to the LMRA as a collective bargaining representative of Thunder Basin employees, cannot "represent" those employees under 30 C.F.R. § 40.1 (b)(1). This is particularly true where Thunder Basin employees have specifically and overwhelmingly (307-56) rejected the UMWA as their representative, pursuant to the election procedures of the LMRA.

16. Notwithstanding this overwhelming rejection of the UMWA by Thunder Basin employees, MSHA persists in the position that the UMWA is a proper Representative of Miners under 30 C.F.R. Part 40 and that Thunder Basin will violate the Mine Act if it does not accept MSHA's interpretation. In taking this position in

conflict with the LMRA, MSHA is acting in excess of its statutory authority.

17. Under the provisions of the Mine Act, as amended, if a mine operator violates the Act, or a regulation thereunder, the mine operator *must* pay a civil penalty which can be up to $50,000. 30 U.S.C. § 820(a), as amended by the Omnibus Budget Reconciliation Act of 1990, Public Law 101-508. Moreover, if a citation is issued and the mine operator refuses to immediately acquiesce in MSHA's position, the mine operator may be subjected to additional civil penalties of up to $5,000 per day for its failure to acquiesce in MSHA's interpretation of the Mine Act. 30 U.S.C. § 820(b), as amended by the Omnibus Budget Reconciliation Act of 1990, Public Law No. 101-508. Further, both the mine operator and corporate directors, officers, or agents individually, may be subjected to criminal penalties involving imprisonment of up to one year and fines (up to $100,000 for the individual and $200,000 for the corporation), as set forth in 18 U.S.C. § 3571. 30 U.S.C. § 820(c) and (d).

18. Given these requirements of the Mine Act, Thunder Basin has only two options. It must either A) acquiesce in the interpretation of MSHA that the UMWA can properly be a representative of Thunder Basin miners, notwithstanding the overwhelming rejection of the UMWA by Thunder Basin employees in an election conducted by the National Labor Relations Board, or B) refuse to accept MSHA's position, in which case it will i) receive a citation for failure to accept the interpretation, and then ii) be directed to accept MSHA's interpretation or iii) have to accept the risk of substantial civil and criminal penalties, including a daily penalty to the maximum allowable by the law ($5,000 per day).

C. *Events at Thunder Basin Leading to Claim*

19. On October 25, 1990, Thunder Basin received the document attached hereto as Exhibit 2, which document purported to designate the UMWA as a representa-

tive of the Black Thunder Mine employees under 30 C.F.R. Part 40.

20. The UMWA is actively seeking to unionize the Black Thunder Mine. This action by the UMWA in seeking designation as a Representative of Miners is intended to further those efforts. Attached as Exhibit [sic] 3 through 6 are documents distributed by the UMWA regarding UMWA organizing efforts and the use of 30 C.F.R. Part 40 in connection with those organizing efforts.

21. By letter dated October 26, 1990, Exhibit 7, Thunder Basin returned the designation to Mr. William Holgate, District Manager of District Nine, Coal Mine Safety and Health, of MSHA, because the designation was invalid on its face.

22. On October 30, 1990, Thunder Basin received a copy of Exhibit 8 from the UMWA, addressed to Mr. Holgate, regarding 30 C.F.R. Part 40.

23. On November 28, 1990, Thunder Basin received a single page, Exhibit 9, in which it appeared that a portion of the first page of Exhibit 2 had been marked out with new information being added.

24. By letter dated November 29, 1990, Exhibit 10, to Mr. Holgate, Thunder Basin renewed its objection to the impropriety of the action by the UMWA. That letter specifically advised MSHA of the prior rejection of the UMWA by Thunder Basin employees and of the fact that the UMWA is improperly using MSHA procedures to try to further union organizing activities.

25. Thunder Basin had no further contact from MSHA with regard to these issues until late February 1991. At that time, as described in Exhibit 11, informal discussions occurred between Mr. W. L. Craig, Manager, Health and Safety, for Thunder Basin, and Mr. Joe Pavlovich, Sub-District Manager of District 9 Coal Mine Safety and Health of MSHA. In both the oral communication, and Exhibit 11, Thunder Basin indicated, for the reasons detailed in Exhibit 10, it had not posted the UMWA designation because it had not received a complete designation of the UMWA under 30 C.F.R. Part 40 and the UMWA could not "represent" Thunder Basin employees under 30 C.F.R. Part 40.

26. On March 7, 1991, an MSHA Inspector, Jimmy Giles, and an MSHA Field Supervisor, Joe Ferguson, went to the Thunder Basin's Black Thunder Mine. At that time they asked whether Thunder Basin had posted the designation of the UMWA to be a miners' representative of Thunder Basin employees.

27. Mr. Craig advised the representatives of MSHA that Thunder Basin had not received any response from MSHA to Thunder Basin's November 29, 1990 letter, Exhibit 10. He further advised them that Thunder Basin had never received a complete designation form properly identifying the mine and that Thunder Basin did not believe the UMWA could properly "represent" its employees.

28. Messrs. Craig, Giles and Ferguson then called Mr. Pavlovich, using a speaker phone. In that conversation, Mr. Pavlovich indicated a letter from Mr. Holgate, in response to Exhibit 10, would be sent to Thunder Basin forthwith. Mr. Pavlovich said the letter would tell Thunder Basin to post and thereby honor the disputed UMWA designation.

D. *Harm to Thunder Basin*

29. When Thunder Basin receives the letter from MSHA responding to Exhibit 10, if Thunder Basin does not post and honor the UMWA designation, or, if Thunder Basin posts the designation, but later refuses to honor it by, for example, disallowing a UMWA designated person to accompany an MSHA inspector on an inspection of Thunder Basin's property, MSHA will require Thunder Basin to immediately comply with MSHA's interpretation. Thunder Basin will then be forced by

MSHA either A) to waive its statutory protections under the LMRA and to accept MSHA's position that the UMWA can represent Thunder Basin employees, notwithstanding the overwhelming rejection of the UMWA by Thunder Basin employees, or B) to receive a citation and to accept the liability for civil and criminal penalties as described above.

30. The risk of daily penalties if Thunder Basin did not waive its LMRA rights during any litigation on the citation is not hypothetical. The Jacobs Ranch Mine of Kerr-McGee Coal Corporation located immediately adjacent to Thunder Basin's Black Thunder Mine objected to MSHA's interpretation on these very issues. As described in the attached Exhibits 12 to 16, which on information and belief Thunder Basin states are a part of the record in administrative litigation involving the Jacobs Ranch Mine, MSHA enforcement officials took the position there that unless Kerr-McGee acquiesced in MSHA's interpretation during the pendency of its administrative litigation and posted a UMWA designation, the maximum allowable daily penalties might be sought.

31. In addition, one mine operator has recently sought declaratory relief from the Federal Mine Safety and Health Review Commission on these very issues. MSHA opposed that request, and the Commission as a procedural matter denied the mine operator's request for declaratory relief, and thus did not address the merits of the issue of how 30 C.F.R. Part 40 should be interpreted in circumstances very similar to those here. *See Secretary of Labor v. MidContinent Resources,* 12 FMSHRC Dec. 949 (May 23, 1990) (Exhibit 17). Further, the Commission has also specifically ruled that although it has authority to issue declaratory relief in certain circumstances, it has no authority to issue declaratory relief where no citation has been issued against the mine operator and then challenged by the mine operator. *Kaiser Coal Corp. v. Secretary of Labor,* 10 FMSHRC Dec. 1165, 1170-1171 (Sept. 27, 1988) (Exhibit 18). In-

deed, in *Kaiser Coal Corp.,* the Commission stated it has no jurisdiction to resolve the issue here because to resolve the dispute both the LMRA and the Mine Act must be construed. *Id.* at 1169.

32. Thunder Basin thus has no remedy before the Federal Mine Safety and Health Review Commission which would allow for a determination of the dispute between it and MSHA whereby Thunder Basin could avoid the risks of enforcement action, either civil or criminal, by MSHA, and avoid waiving its rights under the LMRA.

33. Thunder Basin is entitled to a hearing on the merits of its position in this matter. Thunder Basin has no source of redress before MSHA or the Federal Mine Safety and Helath [sic] Review Commission or any other forum than this Court for a hearing on the merits of its dispute with MSHA. To force it to choose between waiving its clear rights under the LMRA or to risk significant penalties is fundamentally unfair and a denial of due process of law.

CLAIM FOR RELIEF
(DECLARATORY AND INJUNCTIVE RELIEF)

34. Thunder Basin incorporates paragraphs 1 through 33 herein.

35. An actual controversy exists between Thunder Basin and Defendants concerning MSHA's failure to recognize and accept the decision of the overwhelming majority of Thunder Basin's employees under the LMRA to reject the UMWA as their representative and MSHA's failure to apply its regulations in a way consistent with the rights of employees and employers under the LMRA.

36. In ignoring the LMRA in interpreting the term "represents" in 30 C.F.R. § 40.1(b)(1), MSHA is improperly interpreting 30 C.F.R. Part 40 and creating a clear conflict with the interpretation and application of the LMRA.

37. Thunder Basin has no adequate legal or administrative remedy. Unless this Court awards declaratory relief, Thunder Basin can only obtain a hearing and a determination of the merits of its objections to MSHA's interpertation of 30 C.F.R. Part 40 by committing a violation of the law (in MSHA's view), and thereby incurring substantial penalties. If Thunder Basin acquiesces in MSHA's interpretation, whether before a citation is issued, or after a citation is issued in order to avoid the risk of per day civil penalties, Thunder Basin will be required to forego its clear statutory rights under the LMRA, without a hearing.

38. MSHA's persistence that Thunder Basin either violate the Mine Act or waive its LMRA rights is a denial of due process of law and thus a violation of the Constitution of the United States.

39. Thunder Basin will suffer immediate, irreparable, and permanent harm if it is required to waive its rights under the LMRA and to accept the interpretation of MSHA recognizing the UMWA as a representative of Thunder Basin's employees in order to obtain a hearing.

WHEREFORE, Thunder Basin respectfully requests that this Court enter an Order

A. Preliminarily and permanently enjoining Defendants from taking, or recommending, any enforcement action, or issuance of penalties or fines, under the Federal Mine Safety and Health Act of 1977 for alleged violations of 30 C.F.R. Part 40 by Thunder Basin, or any of its officers, agents, or directors, because of Thunder Basin's refusal to recognize the United Mine Workers of America as a Representative of Miners, pending a determination on the merits as to whether the United Mine Workers of America can be a proper representative of Thunder Basin's employees without having first been selected by those employees pursuant to the procedures of the National Labor Relations Board;

B. Declaring that denying Thunder Basin a hearing on the merits of its claim that the United Mine Workers of America cannot be a proper representative of Thunder Basin employees under 30 C.F.R. Part 40 without having first been selected by those employees pursuant to the procedures of the National Labor Relations Board is a denial of due process of law and a violation of the Constitution of the United States;

C. Declaring that Defendants' interpretation of 30 C.F.R. Part 40 is improper, and that the United Mine Workers of America cannot be a Representative of Miners at the Thunder Basin Black Thunder Mine unless and until they have been designated as a representative of employees, pursuant to the procedures of the National Labor Relations Board under the Labor-Management Relations Act; and

D. Granting such other and further relief as this Court may deem appropriate.

Respectfully submitted,

SHERMAN & HOWARD

By: /s/ Charles W. Newcom
CHARLES W. NEWCOM
3000 First Interstate Tower North
633 Seventeenth Street
Denver, Colorado 80202
(303) 297-2900

HIRST & APPLEGATE

By: /s/ Thomas A. Nicholas
THOMAS A. NICHOLAS, III
200 Boyd Building
P.O. Box 1083
Cheyenne, Wyoming 82003
(307) 632-0541

AND

THOMAS F. LINN
RUSSELL JONES
Legal Department
Thunder Basin Coal Company
555 Seventeenth Street, 20th Floor
Denver, Colorado 80202
(303) 293-4234

Attorneys for Plaintiff

Address of Plaintiff:

Thunder Basin Coal Company
P.O. Box 406
Wright, Wyoming 82732

STATE OF WYOMING)
) ss.
COUNTY OF CAMPBELL)

J. A. Herickhoff, being first duly sworn, deposes and says: I am the president of the plaintiff corporation, the Thunder Basin Coal Company, named in the above-entitled action; I make this affidavit in behalf of that corporation; I have read the foregoing complaint and know the contents thereof and the same are true of my own knowledge, except as to those matters therein stated on information and belief, and as to those matters I believe it to be true, and except as to paragraphs 26 through 29 which are verified only by Mr. Craig.

/s/ J. A. Herickhoff
J. A. HERICKHOFF

Subscribed and sworn to before me this 11th day of March, 1991.

[SEAL]

/s/ Patricia A. Mahoney
Notary Public in and for
the County of Campbell,
State of Wyoming

My Commission expires: December 19, 1993.

STATE OF WYOMING)
) ss.
COUNTY OF CAMPBELL)

W. L. Craig, being first duly sworn, deposes and says: I am the Manager, Health and Safety of the plaintiff corporation, the Thunder Basin Coal Company, named in the above-entitled action; I make this affidavit in behalf of that corporation; I have read the foregoing complaint and know the contents thereof and the same are true of my own knowledge, except as to those matters therein stated on information and belief, and as to those matters I believe it to be true.

/s/ W. L. Craig
W. L. CRAIG

Subscribed and sworn to before me this — day of March, 1991.

[SEAL]

/s/ Patricia A. Mahoney
Notary Public in and for
the County of Campbell,
State of Wyoming

My Commission expires: December 19, 1993.

EXHIBIT 2

William A. Holgate
District Manager
CMS&H, District 9
P.O. Box 25367
Denver, CO 80225-0367

Date 10/24/90

Re: Mine Name: ARCO Black Thunder Mine
MSHA ID No.: 48-00977
Operator's Address: PO Box 406
Wright, WY 82732

Dr. [sic] Mr. Holgate:

The following information is being submitted as required by Title 30, Code of Federal Regulations, Section 40.3, which identifies who is to serve as a representative of miners.

A. *Selected Representative of Miners.*

Name: Bob Butero, Int. Rep.

Address: PO Box 3775
Gillette, Wy 82717-3775

Telephone N. (307) 686-9213

Dallas Wolf, Int. Teller
PO Box 3775
Gillette, Wy 82717-3775
(307) 686-9213

B. *Selected Alternate Representative* (Possibly one each shift).

Name	Address	Tele No.
/s/ Loy D. Peters	P.O. 217 Wright, Wy. 82732	464-0728
/s/ Timothy W. Crozier	5407 Raven St. 82716	686-3820
/s/ Thomas M. Wilson	P.O. Box 232 Wright, Wy.	464-0433
/s/ Darryl J. Anderson	Box 87 Wright, Wy. 82732	464-1148

/s/ Darrell D. Ottema	425 Walden Ave. Newcastle, Wy. 82701	746-4190
/s/ Richard D. Shafer	543 Sweetwater Wright, Wyo. 82732	464-1326
/s/ Randall D. Johnson	P.O. Box 1037 Sundance, Wyo. 82729	283-2229
/s/ Donald L. (Greg) Gregory	P.O. Box 942 Newcastle, Wy. 82701	746-3314

C. ☒ Check box if the above selected representatives are representatives for all purposes of relating to the coal act.

E. *If the Representative is Associated with an Organization.*

Organization Name: United Mine Workers of America
Address: 900—15th Street, N.W. Washington, D.C. 20005
Telephone No.: (202) 842-7301

Name and Title of the Official or Position who is to serve as Representative.

Name: Bob Butero
Title: UMWA Int. Saf. Rep.
Address: PO Box 3775 Gillette, Wy 82717-3775
Telephone No.: (307) 686-9213

Name: Dallas Wolf
Title: UMWA Int. Teller
Address: PO Box 3775 Gillette, Wy 82717-3775
Telephone No.: (307) 686-9213

We, the undersigned, have designated the organization and/or those persons listed as designated representatives of the miners. (Two or more miners signatures required.)

/s/ Loy D. Peters Signature	9/26/90 Date		/s/ Darrell D. Ottema Signature	9/26/90 Date	
/s/ Timothy W. Crozier Signature	9/26/90 Date		/s/ Richard D. Shafer Signature	9-26-90 Date	
/s/ Thomas M. Wilson Signature	9-26-90 Date		/s/ Randall D. Johnson Signature	9-26-90 Date	
/s/ Darryl J. Anderson Signature	9/26/90 Date		/s/ Susan Lucero Signature	10-18-90 Date	

F. *Notice to Operator.*

A copy of this letter (and attached authorization) has been delivered to the operator of the Black Thunder mine.

G. *Verification.*

I hereby certify that all information contained herein is true and correct.

/s/ Dallas Wolf
(Signature)

EXHIBIT 6

SAFETY TRAINING CLASSES
TUES. & WED. JANUARY 15 & 16
AT 10AM AND 6PM
AT GRANNIES WEST IN GILLETTE

Due to the success of the Training to date, we are continuing with the process of training as many miners as possible to their rights under MSHA. There has been resistance by the companies in the basin to work with MSHA.

MSHA and the UMWA feel it is imperative that we get this situation in hand. One way is to train miners in their rights under the law. That is why we are offering training in safety and the need for walk around rights with the inspector, as the law states.

The UMWA is offering this training free of charge and/or obligation. We, the Miners for Democracy, need to know as much as we can regarding the safety of our mines. Nobody is out to get anyone, we only want the mines to be as safe as possible.

Nobody but nobody deserves to become a statistic. The latest fatality at a surface mine was in North Dakota in December of 1990. The accident involved the collision of a coal hauler and a scraper, with the scraper operator becoming the fatality.

Whether you are a miners rep now or not, this training is available for everyone. There are no specifications on whom may take the course. If you want to know more about safety or the safety training, you may contact trained Miners Reps or call us at 686-9213.

KNOWLEDGE IS POWER

GET INVOLVED IN SAFETY

SAFETY IS EVERYONES' BUSINESS

EXHIBIT 7

Thunder Basin Coal Company
Post Office Box 406
Wright, Wyoming 82732
Telephone (307) 939-1300

J. A. Herickhoff
President

CERTIFIED #P 114 430 667
RETURN RECEIPT REQUESTED

October 26, 1990

Mr. William A. Holgate
District Manager
CMS&H, District 9
P. O. Box 25367
Denver, Colorado 80225-0367

RE: Thunder Basin Coal Company, Black Thunder Mine
MSHA ID #48-00977

Dear Mr. Holgate:

Attached is a copy of a document Thunder Basin Coal Company received which seeks to designate the United Mine Workers of America, and certain individuals, as walkaround representatives under 30 C.F.R. Part 40. You should be advised that this designation does not, as required by 30 C.F.R. § 40.3(a)(2), provide the name of the mine operator. ARCO does not operate the mine. The mine operator is Thunder Basin Coal Company and the name of the mine is the Black Thunder Mine. Additionally, complete addresses and telephone numbers are not provided for the alternate representatives listed on the form.

For these reasons, the form is invalid and should be returned to the United Mine Workers of America.

I should add that the company has other objections to this designation. Those need not be addressed here pending our first receiving a form containing the information listed in 30 C.F.R. § 40.3(a).

Very truly yours,

/s/ J. A. Herickhoff
J. A. HERICKHOFF

JAH:bc

Attachment

EXHIBIT 8

UNITED MINE WORKERS OF AMERICA
P. O. Box 3775
Gillette, Wyoming 82717
Phone (307) 686-9213

October 25, 1990

Mr. William A. Holgate
District Manager
CMS&H, District 9
P.O. Box 25367
Denver, CO 80225-0367

Dear Mr. Holgate:

As you know we have trained and established miners reps under the Act at Kerr McGee, Jacobs Ranch Mine ID #48-00997, and at ARCO, Black Thunder Mine ID #48-00977.

Jacobs Ranch Mine management has not posted the notice as required under part 40.4 of the Federal Register. Therefore, we request action on this problem as soon as possible, and to be informed on the results of your action.

Our goal is safety at the mines in the Basin. To achieve this goal we have established a training program for miners. The training is done by our International Safety Representative for this area. We are training miners in all aspects of the law and their rights under the law. It is imperative that we recognize and support the miners who have taken the initiative to learn the law and apply it for the benefit of their fellow miners.

Sincerely,
Dallas Wolf

/s/ Dallas Wolf
International Teller/Organizer

cc: Safety Commitees Jacobs Ranch and Black Thunder mines

Joe Hain, Safety Director United Mine Workers of America

Richard Kirkpatrik, Region IV Director UMWA

Robert Butero, International Safety Representative UMWA

G. Paul Anderson, Gen Manager Jacobs Ranch Mine

James A. Herickhoff, General Manager Black Thunder Mine

EXHIBIT 9

William A. Holgate
District Manager
CMS&H, District 9
P.O. Box 25367
Denver, CO 80225-0367

Re: Mine Name: Thunder Basin Coal Co.
Black Thunder Mine

MSHA ID No.: 48-00977

Operator's Address: PO Box 406
Wright, WY 82732

Dr. [sic] Mr. Holgate:

The following information is being submitted as required by Title 30, Code of Federal Regulations, Section 40.3, which identifies who is to serve as a representative of miners.

A. *Selected Representative of Miners.*

Name:	Bob Butero, Int. Rep.
Address:	PO Box 3775 Gillette, Wy 82717-3775
Telephone N.	(307) 686-9213
Name:	Dallas Wolf, Int. Teller
Address:	PO Box 3775 Gillette, Wy 82717-3775
Telephone N.	(307) 686-9213

B. *Selected Alternate Representative* (Possibly one each shift).

Name	Address	Tele No.
/s/ Loy D. Peters	P.O. 217 Wright, Wy. 82732	464-0728
/s/ Timothy W. Crozier	5407 Raven St. 82716	686-3820
/s/ Thomas M. Wilson	P.O. Box 232 Wright, Wy.	464-0433
/s/ Darryl J. Anderson	Box 87 Wright, Wy. 82732	464-1148
/s/ Darrell D. Ottema	425 Walden Ave. Newcastle, Wy. 82701	746-4190
/s/ Richard D. Shafer	543 Sweetwater Wright, Wyo. 82732	464-1326
/s/ Randall D. Johnson	P.O. Box 1037 Sundance, Wyo. 82729	283-2229
/s/ Donald L. (Greg) Gregory	P.O. Box 942 Newcastle, Wy. 82701	746-3314

C. ☒ Check box if the above selected representatives are representatives for all purposes of relating to the coal act.

EXHIBIT 10

Thunder Basin Coal Company
Post Office Box 406
Wright, Wyoming 82732
Telephone (307) 939-1300

J. A. Herickhoff
President

Certified P 553 188 202

November 29, 1990

William Holgate, District Manager
Mine Safety and Health Administration
District #9
Coal Mine Safety and Health
P.O. Box 25367, DFC
Denver, CO 80225

Dear Mr. Holgate:

On November 28, we received the attached single page document from the United Mine Workers of America (UMWA) which purports to name the United Mine Workers of America and its employees, Messrs. Butero and Wolf as the representative of miners under the Federal Mine Safety and Health Act of 1977.

The attempted designation is invalid for two reasons:

1. In 1987, the United Mine Workers of America caused a representation election to be held at Thunder Basin Coal Company for the purpose of attempting to have themselves designated under the Labor Management Relations Act as the authorized bargaining representative for the entire Thunder Basin work force. The results of the election (56 for, 307 against) demonstrated an overwhelming rejection of the UMWA as the representative of our work force. No representation

election has been held since and, in our view, this result continues to fairly reflect the feeling of our work force concerning the UMWA.

There are 17 mines in the Wyoming Powder River Basin. None of those mines are represented by the UMWA even though the UMWA maintains an office in the Wyoming Powder River Basin. Thus, UMWA's presence in the area is solely for the purpose of furthering its own interest in soliciting and obtaining additional union members and seeking to represent the work force at Thunder Basin Coal Company and other area mines.

The Tenth Circuit Court of Appeals in a recent case in which the UMWA participated, recognized that where the Mine Act's provisions for designating miner representatives are misused, "the solution is for the operator to take action against individual instances of abuse when it discovers them". *Utah Power & Light Co., v. Secretary of Labor*, 897 F.2d 447, 452 (10th Cir. 1990). The Mine Act's miner representative designation process is being abused in any instance in which that process is part of an effort to assist organizing efforts. That is clearly the case here.

While the Tenth Circuit was less than clear as to what action should or may be taken in any particular instance, we believe that fairness and justice require that we point out to you immediately the flagrant misuse of the Mine Act in this instance. Further, and in view of the Tenth Circuit's Decision, MSHA has the obligation to make inquiry and determination that any designation of non-employees under 30 C.F.R. Part 40 is done in a manner which does not contravene the holding in the Tenth Circuit case before it takes any action to enforce that purported designation.

2. The second reason the attempted designation is invalid is somewhat technical. You will recall that I returned to you, as invalid, an earlier attempted UMWA designation consisting of two pages. This time I received only one page and since no signature page was sent, I have no way of knowing whether a new form with the proper company name was signed, whether all that was done is to change the first page, or whether the second and any additional pages were not included through inadvertence.

   If the initial form was simply altered without new signatures being obtained then the form is improper. Given the apparent identity of the handwritten portion of the enclosed page with the first page of the prior attempted designation, I certainly question whether a new form was signed as required. Additionally, even if new signatures were obtained, we still have not received the full form.

   Finally, there is nothing to show that the information contained in the attached was certified as required by 30 C.F.R. § 40.3(a)(7)

In view of the above, the attempted designation is invalid and the paper recently received is hereby returned to you.

Very truly yours,

/s/ J.A. Herickhoff
J.A. HERICKHOFF

JAH/sh

Attachment

cc: W.J. Tattersall, Assistant Secretary of Labor
Mine Safety and Health Administration
4015 Wilson Blvd.
Arlington, VA 22203
Certified P 553 188 203

EXHIBIT 11

March 1, 1991 CONFIDENTIAL

Mr. Joe Pavlovich
Sub-District Manager
CMH&S [sic] District #9
P.O. Box 817
McAlester, Oklahoma 74502-0817

Dear Mr. Pavlovich:

I enjoyed having dinner with you on February 26, 1991 at the Prime Rib Restaurant in Gillette, Wyoming.

During our discussions, you asked if we posted our original notice of Representative of Miners that listed two UMWA employees as the designated miner's representative. My response was that we had not received a valid copy to post.

In follow-up to our conversation, I've checked our files and found that we have not received a valid designation listing UMWA officials as the designated representative of miners for our employees.

We originally received a two page designation from the UMWA on October 24, 1990 that listed an incorrect mine name. At that time, our President and General Manager, Mr. Jim Herickhoff, sent a letter to MSHA District Manager, William Holgate (dated 10-26-90), stating that the designation was defective and enclosing the two pages received from the UMWA. Mr. Holgate responded to that letter and confirmed that the designation was in fact defective.

On November 28, 1991, we received an invalid single page document which seemed to name the UMWA as a designated representative. Again, Mr. Herickhoff responded by sending the attached letter to Mr. Holgate.

At this time, we have not received a response from Mr. Holgate.

We have received and posted three other Part 40 designations. These include designees Everett Kraft (dated 12-2-90), Ray McIntosh (dated 12-4-90), and Butch Knutson (dated 12-11-90).

On MSHA's last inspection, at our mine, your Field Supervisor/Inspector, Mr. Joe Ferguson, requested and was accompanied by a designated representative of miners.

In short, we have posted all valid Part 40 "Miner's Representative" designations that have been received.

Sincerely,

/s/ W. L. Craig
W. L. CRAIG
Manager, Health & Safety

Attachment

EXHIBIT 12

Coal Mine Safety Administration
P.O. Box 817
McAlester, Oklahoma 74502-0817

[SEAL]

December 6, 1990

MEMORANDUM FOR: WILLIAM A. HOLGATE
District Manager

FROM: JOSEPH W. PAVLOVICH
Subdistrict Manager

SUBJECT: Request to Initiate Action Concerning Daily Assessment for an Unabated Violation

On October 25, 1990, Inspector Jimmie Giles issued a citation at the Jacobs Ranch Mine, ID No. 48-00997, as a result of a 103(g) request. The citation, No. 3242337, was issued for the operator's failure to post a listing of the representatives of the miners on the mine bulletin board. Giles informed the operator that he had 15 minutes to post the listing to terminate the citation. The operator refused to post the listing saying he would not acknowledge those persons as representatives. After the expiration of reasonable time, Giles issued 104(b) Order No. 3242337 for failure to abate. This was issued as a "no area affected" closure order. The operator still refused to post the listing and has maintained this position as of this date.

Shortly after the order was issued, both Jerry Taylor, District 9 engineering coordinator, and myself were contacted by William Murray, vice president of underground mining for Kerr-McGee Coal Corporation, concerning the citation and order. Each of us informed Mr. Murray independently that no area of the mine would be closed and production would not be affected, but that MSHA could

propose a daily penalty of up to $1,000 per day for failure to abate the 104(b) order.

On a subsequent phone conversation, again with Mr. Murray, he informed me of his intention to request a Health and Safety Conference and an expedited hearing with the Commission to request vacating the citation and order. I informed Mr. Murray that if he was following that action, a daily penalty probably would not be imposed but that the district could still maintain that option. I also informed you of this conversation and a discussion I had with Rick High and Vernon Weaver of the Arlington Assessment Office concerning the daily penalty.

On November 9, 1990, I conducted a Health and Safety Conference with Mr. Murray; Ron Crispin, Manager; and Lenny Altenberger, Safety Director. The labor representatives were notified and were contacted on the telephone during the conference. The operator had no new information to present at the conference and stated they would probably pursue an expedited hearing request. All aspects of the violation were upheld. The management representatives contended that they had no intention of recognizing the representatives or posting the lists to terminate the 104(b) order. I once again informed them of the potential for a daily penalty.

* * * *

[Material redacted by MSHA]

* * * *

I feel this turn of events shows this operator's lack of respect for this regulation and is intentionally designed to dispute and threaten MSHA's authority. I am now facing the possibility of having an outstanding 104(b) order at an active producing coal mine for several months, possibly even exceeding one year, with no effort of the operator to correct the condition. I would ask that the district take action to begin imposition of the daily penalty under Section 110(b) of the Act at a

rate commensurate with the operator's adamant posture toward refusal to correct the practice. This operator is attempting to place MSHA in the middle of its problems with labor, and its attitude reflects the position that enforced portions of the regulations which do not cease or hinder production need not be followed.

Please contact me concerning your opinion of this matter or any additional information needed.

EXHIBIT 13

U.S. DEPARTMENT OF LABOR
Mine Safety and Health Administration
P.O. Box 25367
Denver, Colorado 80225-0367
Coal Mine Safety and Health
District 9

[SEAL]

CMS&H Memo No. D9-00-91-055

December 14, 1990

MEMORANDUM FOR: JERRY L. SPICER
Administrator
for Coal Mine Safety
and Health

FROM: /s/ William A. Holgate
WILLIAM A. HOLGATE
District Manager

SUBJECT: Imposition of Daily Penalty Under Section 110(b) of the Act, Jacobs Ranch Mine, I.D. No. 48-00997 Kerr-McGee Coal Corporation

It is recommended that the maximum allowable daily penalty, under Section 110(b) of the Mine Act, be imposed upon Kerr-McGee Coal Corporations Jacobs Ranch Mine, for failure to terminate order number 3242340.

The operator's continuous refusal to comply with the order demonstrates an apparent defiance to MSHA's enforcement sanctions. Attached are the citation, order and other related documentation to support this action.

If you have any questions regarding this matter, please contact my office at FTS: 554-5458.

Attachments

cc: Margaret Miller, SOL

EXHIBIT 14

U.S. DEPARTMENT OF LABOR
Office of the Solicitor
1961 Stout Street
Denver, Colorado 80294
(303) 844-5521
FTS: 564-5521

Telecopier
(303) 844-6603
FTS: 564-6603

December 21, 1990

Charles W. Newcom
Sherman & Howard
3000 First Interstate Tower Bldg.
633 17th St.
Denver, CO 80202

Re: Kerr-McGee Coal Company

Dear Mr. Newcom:

This letter is to inform you that the Coal Mine Safety and Health Administration, District 9, has proposed to the MSHA assessment office that Kerr-McGee be fined $1000.00 per day penalty for failing to abate the citation and order issued to it in October. It is MSHA's position that Kerr-McGee is blatantly ignoring the agency's order to abate the citation and is spurning the authority vested in MSHA by Congress. The Act is clear that citations must be abated in a reasonable time, or a fine may be imposed.

The proposal has been sent to the office in Arlington and you should receive a letter from them in a short time explaining the imposition of the penalty. I have not seen a copy of the letter, nor do I know its contents, I am writing simply as a courtesy to let you know the status of

MSHA's action in this matter. The assessment office is not obligated to follow the recommendation and may give Kerr-McGee additional time to abate.

If you have any questions about this matter, I would be happy to discuss it with you.

Sincerely,

Henry C. Mahlman
Associate Regional Solicitor

By /s/ Margaret A. Miller
MARGARET A. MILLER
Attorney

EXHIBIT 15

U.S. Department of Labor

[SEAL]

Mine Safety and Health Administration
P.O. Box 25367
Denver, Colorado 80225-0367
Coal Mine Safety and Health
District 9

January 2, 1991

Mr. David B. Richardson
Supervisor of Safety
Jacobs Ranch Mine
Kerr-McGee Coal Corporation
Caller Box 3013
Gillette, Wyoming 82716

Re: Penalty Provisions of Section 110(b)

Dear Mr. Richardson:

I am writing to express the Mine Safety and Health Administration's (MSHA) concern with Kerr-McGee's refusal to properly post the designation of officials of the United Mine Workers of America (UMWA) as representative of miners at your Jacobs Ranch Mine. As you know, the UMWA has been designated under 30 CFR Part 40 to serve as representative of miners for health and safety purposes under the Federal Mine Safety and Health Act of 1977 (Mine Act).

MSHA issued Citation No. 3242337 on October 25, 1990, and, after a reasonable abatement period, issued a Section 104(b) order. It is MSHA's statutory responsibility to require compliance with all of its orders. Your continued noncompliance has led me to consider this violation for the civil penalty provisions of Section 110 (b) of the Mine Act, which authorizes a daily civil penalty. I hope that this sanction will not be necessary.

I understand your reasons for noncompliance, and while I recognize your desire to protect your interests in the labor relations area, I must insist upon compliance with the citation and order issued on October 25, 1990. If you have not abated this violation within 24 hours of receipt of this letter, I will recommend implementation of a civil penalty, under Section 110(b) of the Mine Act, for each day that a failure to correct the cited violation continues.

I trust that I have made our position clear. If you have any questions, please contact me at (303) 231-5458.

Sincerely,

/s/ Jerry K. Taylor *for*
William A. Holgate
District Manager

EXHIBIT 16

KERR-McGEE COAL CORPORATION
Caller Box 3013
Gillette, Wyoming 82717-3013

January 3, 1991

Mr. William A. Holgate
District Manager
Coal Mine Safety & Health District 9
Mine Safety and Health Administration
U.S. Department of Labor
P.O. Box 25367
Denver, Colorado 80225-0367

Re: Citation No. 3242327—Order No. 3242340

Dear Mr. Holgate:

We are in receipt of your letter of January 2, 1991. As your letter required, we have today posted the designation of miners' representative which Kerr-McGee Coal contends is defective and improper under law. We post this designation under strong protest.

The decision to post this designation was reluctantly taken in light of the 24-hour demand in your January 2nd letter, and communications from the Solicitor's office that District 9 had requested penalties of $1,000 per day for each day the Company continued to fail to post the disputed designation of representative.

Kerr-McGee Coal will continue to vigorously pursue relief from the citation and order based on the improper designation of UMW officials and their alternates.

Very truly yours,

Kerr-McGee Coal Corporation

/s/ G. Paul Anderson
G. PAUL ANDERSON
General Manager
Jacobs Ranch Mine

GPA/dfs

PER 6-1
xc: Jimmie Giles (Hand Delivered)
C. B. Hendricks, Esq.
C. W. Newcome [sic], Esq.

[EXCERPTS FROM TRANSCRIPT OF HEARING ON MOTION FOR PRELIMINARY INJUNCTION]

* * * *

[68] MR. NEWCOM: Let me just check my notes, Your Honor. I might just reflect in the interest of the record, Your Honor, since we don't have extra copies, I believe the letter that Mr. Herickhoff referred to earlier I think is Exhibit either B or C to the Secretary's brief in response to our motion.

THE COURT: Very well.

MR. NEWCOM: We would stipulate to the admission [69] of the exhibits attached to the Secretary's memorandum.

MS. MILLER: I'm sorry?

MR. NEWCOM: I was just indicating, Peggy, to the Court that the letter to which Mr. Herickhoff having received—

MS. MILLER: Is attached to our—

MR. NEWCOM: I think it's either B or C. I don't recall.

MS. MILLER: It's C, and that would be fine, Your Honor.

MR. NEWCOM: And we'll stipulate to the admissibility of A through—

MS. MILLER: D.

MR. NEWCOM: To the exhibits attached to her—

THE COURT: The exhibits attached to the Secretary's response may also be received.

(Defendant's Exhibits A through D received in evidence.)

* * * *

[89] JOSEPH PAVLOVICH

called as a witness on behalf of the Defendant, being first duly sworn, on his oath testified as follows:

DIRECT EXAMINATION

Q. (BY MS. MILLER) Will you state your full name and spell your last name, please?

[90] A. My name is Joseph William Pavlovich, P-A-V-L-O-V-I-C-H.

Q. And your address, Mr. Pavlovich?

A. My business address is Post Office Box 817, McAlester, Oklahoma.

Q. Mr. Pavlovich, you are currently employed with the Mine Safety and Health Administration; is that correct?

A. Yes, I am.

Q. How long have you been employed with the Mine Safety and Health Administration?

A. Approximately 15 years.

* * * *

Q. What's your present position with MSHA?

[91] A. I'm the sub-district manger [sic] in McAlester, Oklahoma.

Q. Would you tell us, please, what the sub-district manager does for MSHA?

A. I'm responsible for health and safety inspections and investigation activities at coal mines that are located in 14 states west of the Mississippi.

Q. Does that included [sic] Wyoming?

A. Yes, it does include Wyoming.

* * * *

[117] CROSS-EXAMINATION

Q. (BY MR. NEWCOM) You've talked about the amount of time Kerr-McGee was given in order to post once they got the citation. That was 15 minutes, wasn't it?

A. Yes, sir.

Q. You also indicated that, in fact, Kerr-McGee never got a daily penalty, and the reason they didn't get a daily penalty is rather than risk the thousand-dollars-a-day threat, they posted it; isn't that right?

A. That is correct.

Q. And to be sure that I'm correct, Mr. Pavlovich, as to how you envision the Act operating, if no relief is granted by this Court that would prevent a citation from being issued, if Thunder Basin doesn't post the disputed UMWA designation, step 1 is they'll be issued a citation; isn't that right?

A. That is correct.

Q. And they'll be given some period of time, maybe more than 15 minutes, maybe less, to post; isn't that right?

A. It would be a reasonable period of time, yes, sir.

Q. If they don't post it, then they'll be subject to a [118] 104(b) order for failure to abate; isn't that correct?

A. That is correct.

Q. And at that point, unless they choose to pursue expedited litigation on a four-day notice with no discovery and any real opportunity to prepare, if they don't take that expedited litigation route, then the next step will be, as you described to us with Kerr-McGee, they're going to be threatened with daily penalties; isn't that right?

A. I won't say that necessarily is correct.

Q. But certainly, that's what you yourself did—

A. Yes, sir, I did.

Q. —as manager for that mine, which you're also the manager here.

A. Yes.

Q. When there was an expedited litigation, you proposed daily penalties.

A. Yes, I did.

Q. And ultimately, I think that led to Exhibit 15, excuse me, going to Kerr-McGee saying post in 24 hours or the penalties start running; isn't that right?

A. Yes, sir, that is the letter that was sent to Kerr-McGee.

Q. Then in Exhibit 16, in fact, Kerr-McGee responded and said "Okay, we'll post"; isn't that correct?

A. Yes.

* * * *

[LETTER FROM WILLIAM HOLGATE TO J. A. HERICKHOFF]

EXHIBIT C

Coal Mine Safety & Health
District Nine

March 11, 1991

J. A. Herickho.., President
Thunder Basin Coal Company
P. O. Box 406
Wright, Wyoming 82732

Re: Black Thunder Mine
ID No. 48-00977
Representative of Miners

Dear Mr. Herickhoff:

I apologize for the delay in replying to your letter of November 29, 1990, regarding the representative of miners at the subject mine. Your concerns stated in the letter regarding the validity of the representative of miners have been noted.

It should be pointed out that the walkaround rights prescribed in Section 103 (f) of the Federal Mine Safety & Health Act of 1977 (Mine Act), extends to miners' representatives who are *not* employees of the mine operator. This is a well-established matter of law, *Utah Power & Light Co., v. Secretary of Labor,* 897 F. 2d (10th Cir. 1990).

Also, it has been MSHA's position in prior court and commission cases, that an operator's general belief that a representative employed by a union will use his access to the mine for union organizing purposes, is irrelvant [sic] to the exercise of Mine Act rights. It is clear that the right of the miners' representative, to participate under Section 103 (f) of the Mine Act, is not an uncontrolled access right to the mine property to engage in any activity that the miners' representative wants. The right is one limited to travel and participate with the MSHA inspector in the safety and health inspection of the mine.

The MSHA inspector controls the inspection, and it is the inspector's responsibility to ensure that the miners' representative activities are limited to aiding the inspection and not to engage in other unrelated activities.

The information submitted by Mr. Dallas Wolf on October 24, 1990, was returned to him because it contained errors regarding the names of the mine and the company. A subsequent submittal from Mr. Wolf was correct, and was placed on file at the District Office. This subsequent submittal was duly signed by Mr. Wolf, and was correctly completed as per the requirements of 30 CFR, Part 40. It was certified by Mr. Wolf as per 30 CFR, Section 40.3 (a)(7). Proper signatures have been placed on the necessary forms. It is the responsibility of the miners' representative to provide a copy of the information to the operator, and it is the operator's responsibility to post the information. (Refer to 30 CFR, Part 40, Sections 40.2 (a) and 40.4)

On January 29, 1991, Mr. Wolf was notified, in writing, acknowledging his submittal regarding miners' representatives at the subject mine. A copy of Mr. Wolfs' [sic] submittal, and a copy of our acknowledgement letter is enclosed for your information and use.

Once again, I am sorry for the delay in replying to your letter. If you have any questions regarding this matter, contact this office at 303/231-5462.

Sincerely,

William A. Holgate
District Manager

Enclosure

bcc: Health File
Sheridan FO
MSDO
EC File
D-9 Chron
Herickof.f:Miller

Supreme Court, U.S.
FILED
MAY 10 1993
OFFICE OF THE CLERK

No. 92-896

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THUNDER BASIN COAL COMPANY,
Petitioner,

v.

ROBERT B. REICH, as Secretary of Labor; WILLIAM J. TATTERSALL, as Assistant Secretary of Labor For Mine Safety and Health; WILLIAM HOLGATE, as District Manager, Coal Mine Safety and Health Administration of the United States Department of Labor; Mine Safety and Health Administration of the United States Department of Labor,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE PETITIONER

THOMAS F. LINN
ATLANTIC RICHFIELD COMPANY
555 17th Street, 20th Floor
Denver, Colorado 80202
(303) 293-4234

CHARLES W. NEWCOM
(Counsel of Record)
J. MARK BAIRD
SHERMAN & HOWARD
3000 First Interstate Tower North
633 Seventeenth Street
Denver, Colorado 80202
(303) 297-2900

WAYNE S. BISHOP
STEWART A. BLOCK
ACKERSON & BISHOP
1275 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20004
(202) 637-0319
Counsel for Petitioner

Date: May 10, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Whether a federal district court has jurisdiction to hear pre-enforcement and collateral challenges on constitutional and federal question grounds to an administrative application of the Mine Safety and Health Act which directly conflicts with a statutory right granted under a separate federal statute over which the administrative agency has no jurisdiction or expertise.

PARTIES TO THE PROCEEDING

The parties before this Court are all listed in the caption.

Petitioner Thunder Basin Coal Company ("Thunder Basin") is a wholly-owned subsidiary of Atlantic Richfield Company. Thunder Basin has no subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
I. STATEMENT OF FACTS	2
A. UMWA Use of The Mine Act For Representational Purposes	3
B. MSHA Insistence on UMWA Designation	4
C. Mine Act Enforcement By MSHA For Failure to Honor UMWA Designation	5
II. THE PROCEEDINGS BELOW	7
SUMMARY OF ARGUMENT	10
ARGUMENT	15
I. INTRODUCTION: FEDERAL DISTRICT COURTS HAVE JURISDICTION TO HEAR PRE-ENFORCEMENT AND COLLATERAL CHALLENGES TO ADMINISTRATIVE ACTION ABSENT CLEAR AND CONVINCING EVIDENCE THAT CONGRESS INTENDED TO PRECLUDE SUCH ACTION	15
A. The Issue Presented	15
B. The Controlling Principles	15

TABLE OF CONTENTS—Continued

	Page
II. THE MINE ACT DOES NOT PRECLUDE PRE-ENFORCEMENT AND COLLATERAL CHALLENGES IN FEDERAL DISTRICT COURT	17
A. The Language of the Mine Act Suggests No Preclusion Intention	17
B. The Legislative History Supports A Legislative Intention to Permit Pre-Enforcement And Collateral Challenges	21
III. THUNDER BASIN PRESENTED A JUSTICIABLE CLAIM OF STATUTORY CONFLICT AND CONSTITUTIONAL INFIRMITY APPROPRIATE FOR FEDERAL QUESTION JURISDICTION	24
A. The Federal District Court Had Jurisdiction to Hear a Statutory Conflict Challenge Outside MSHA's Expertise	25
B. The Federal District Court Had Jurisdiction To Hear Thunder Basin's Constitutional Claims	29
C. The Case Is Ripe And Appropriate For Judicial Review	36
1. MSHA's UMWA Designation Is Ripe For Judicial Resolution	37
2. Thunder Basin Is Not Required To Exhaust Its Administrative Remedies Before Initiating Suit	40
IV. THE COURT OF APPEALS' DECISION SHOULD BE REVERSED AND THE CASE REMANDED	42
CONCLUSION	45

TABLE OF AUTHORITIES

CASES	Page
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)	*passim*
Barry v. Barchi, 443 U.S. 55 (1979)	41
Bell v. New Jersey, 461 U.S. 773 (1983)	37
Bituminous Coal Operators' Ass'n v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977)	*passim*
Bowen v. City of New York, 476 U.S. 647 (1986)	41
Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986)	16, 37
Califano v. Sanders, 430 U.S. 99 (1977)	40
Central Hardware Co. v. NLRB, 407 U.S. 539 (1972)	26
Coit Indep. Joint Venture v. Federal Sav. & Loan Ins. Co., 489 U.S. 561 (1989)	14, 40
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975)	45
Duke Power Co. v. Carolina Env. Study Group, Inc., 438 U.S. 59 (1978)	25, 36
Ex parte Young, 209 U.S. 123 (1908)	32
Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967)	*passim*
Garrity v. New Jersey, 385 U.S. 493 (1967)	31, 32
Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980)	38
Hudgens v. NLRB, 424 U.S. 507 (1976)	26
Johnson v. Robison, 415 U.S. 361 (1974)	19, 25
Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123 (1951)	29
Lechmere, Inc. v. NLRB, —— U.S. ——, 112 S. Ct. 841 (1992)	12, 25, 26, 44
Leedom v. Kyne, 358 U.S. 184 (1958)	12, 16, 27
Lindahl v. Office of Personnel Management, 470 U.S. 768 (1985)	20, 23
Lorrillard v. Pons, 434 U.S. 575 (1978)	11, 12, 22
Marshall v. Jerrico, Inc., 446 U.S. 238 (1980)	34
Mathews v. Eldridge, 424 U.S. 319 (1976)	*passim*
McCarthy v. Madigan, —— U.S. ——, 117 L.Ed.2d 291 (1992)	14, 41
McKart v. United States, 395 U.S. 185 (1969)	41
McNary v. Haitian Refugee Ctr., 498 U.S. 479 (1991)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956)	26
Oestereich v. Selective Serv. Sys. Local Bd., 393 U.S. 233 (1968)	12, 16, 27
Public Util. Comm. v. United States, 355 U.S. 534 (1958)	36
Reiter v. Cooper, —— U.S. ——, 122 L.Ed.2d 604 (1993)	14, 41
Simmons v. United States, 390 U.S. 377 (1968)	32
Southern Ohio Coal Co. v. Donovan, 774 F.2d 693 (6th Cir. 1985), *amended*, 781 F.2d 57 (6th Cir. 1986)	10, 17
Thunder Basin Coal Co. v. Martin, 969 F.2d 970 (10th Cir. 1992)	2
Traynor v. Turnage, 485 U.S. 535 (1988)	*passim*
Union Pac. R.R. v. Public Serv. Comm'n, 248 U.S. 67 (1918)	32
United States v. Jackson, 390 U.S. 570 (1968)	32
Utah Power & Light Co. v. Secretary of Labor, 897 F.2d 447 (10th Cir. 1990)	26
Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965)	27
REGULATORY PROCEEDINGS	
Kaiser Coal Corp. v. Secretary of Labor, 10 FMSHRC 1165 (1988)	5
Kerr-McGee Coal Corp. v. Secretary of Labor, Mine Safety and Health Admin., 15 FMSHRC ——, 1993 OSHD (CCH) ¶ 30,013 (1993), *appeal pending*, Case No. 93-1250 (D.C. Cir.)	7, 28, 41
Secretary of Labor and UMWA v. Jim Walter Resources, 7 FMSHRC Dec. 1348 (1985), *aff'd*, 822 F.2d 1134 (D.C. Cir. 1987)	8
Secretary of Labor v. Mid-Continent Resources, Inc., 12 FMSHRC 949 (1990)	5
UMWA on behalf of James Rowe v. Peabody Coal Co., 7 FMSHRC 1357 (1985), *aff'd*, 822 F.2d 1134 (D.C. Cir. 1987)	8, 41

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES	Page
National Labor Relations Act of 1935, 29 U.S.C. §§ 141-187, 61 Stat. 136, 73 Stat. 519, *as amended*	2
28 U.S.C. § 1254(1), 62 Stat. 928, 102 Stat. 662	2
28 U.S.C. § 1331, 62 Stat. 930	*passim*
28 U.S.C. §§ 2201-2202, 62 Stat. 964	2
Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-962, 83 Stat. 742, 91 Stat. 1290, 93 Stat. 695, *as amended*	2
§ 811	18
§ 813	18
§ 813(c)	4
§ 813(f)	3, 4
§ 813(g)	3, 4
§ 814	18
§ 814(b)	6
§ 815	18
§ 815(a)	18
§ 815(b)	5
§ 815(b)(1)(A)	18, 20
§ 815(c)	4
§ 815(d)	4, 5, 18
§ 816(a)	18, 19
§ 816(a)(1)	5
§ 817(e)	4
§ 819(b)	4
§ 820(a)	5
§ 820(b)	6
§ 820(c)	5
§ 820(d)	5
§ 820(i)	5
§ 823(d)(1)	5
§ 823(d)(2)	5
§ 960	20
38 U.S.C. § 511(a)	20, 29
42 U.S.C. § 405(h)	20

TABLE OF AUTHORITIES—Continued

FEDERAL REGULATIONS	Page
29 C.F.R. § 2700.4	4
30 C.F.R. pt. 44	4
30 C.F.R. §§ 100.1-100.8	5
30 C.F.R. § 100.3(f)	5
30 C.F.R. § 100.4	5
30 C.F.R. § 40.1(b)(1)	3, 7
30 C.F.R. § 40.5	4
30 C.F.R. § 77.104	4
30 C.F.R. § 77.106	4
30 C.F.R. § 77.704-8	4
30 C.F.R. § 77.800-2	4
30 C.F.R. § 77.900-2	4
30 C.F.R. § 77.1101	4
30 C.F.R. § 77.1110	4
30 C.F.R. § 77.1403	4
30 C.F.R. § 77.1404	4
30 C.F.R. § 77.1433	4
30 C.F.R. § 77.1606	4
30 C.F.R. § 77.1713	4
30 C.F.R. § 77.1906	4

CONGRESSIONAL MATERIALS

Subcomm. on Labor of the Comm. on Human Resources, 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 (Comm. Print 1978)	21, 22, 23
S. Rep. 181, 95th Cong., 1st Sess. p. 34 (1977)	21, 22, 23
123 Cong. Rec. 19,925 (1977)	23
123 Cong. Rec. 19,927 (1977)	21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-896

THUNDER BASIN COAL COMPANY,
Petitioner,
v.

ROBERT B. REICH, as Secretary of Labor; WILLIAM J. TATTERSALL, as Assistant Secretary of Labor For Mine Safety and Health; WILLIAM HOLGATE, as District Manager, Coal Mine Safety and Health Administration of the United States Department of Labor; Mine Safety and Health Administration of the United States Department of Labor,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

This case arises from decisions of the United States District Court for the District of Wyoming granting Thunder Basin's Motion for Preliminary Injunction (Pet. App. 24-30)[1] on March 21, 1991 and denying the Secretary of Labor's Motion to Dismiss (Pet. App. 19-23) on May 20, 1991. The Judgment and Opinion of the Tenth Circuit (Pet. App. 1-16), reversing the District

[1] "Pet. App." refers to the appendix to the Petition for Writ of Certiorari.

Court's decisions, was entered on July 20, 1992. *Thunder Basin Coal Co. v. Martin*, 969 F.2d 970 (10th Cir. 1992). Thunder Basin's timely Petition for Rehearing with Suggestion for Rehearing En Banc was denied by the Tenth Circuit on August 28, 1992 (Pet. App. 17-18).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 62 Stat. 928, 102 Stat. 662, 28 U.S.C. § 1254(1). The District Court's jurisdiction was invoked pursuant to 62 Stat. 964, 28 U.S.C. §§ 2201-2202 (1988) and 62 Stat. 930, 28 U.S.C. § 1331. This Court granted the Petition for a Writ of Certiorari on March 8, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Thunder Basin asserts a violation of the Due Process clause of the Fifth Amendment of the United States Constitution. The issues also present a conflict between two federal statutes: the National Labor Relations Act of 1935 ("NLRA"), 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 141-187, *as amended*, and the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 83 Stat. 742, 91 Stat. 1290, 93 Stat. 695, 30 U.S.C. §§ 801-962, *as amended*. The relevant provisions of the Mine Act appear in the Appendix to the Petition for Writ of Certiorari (Pet. App. 31-35).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Thunder Basin operates the Black Thunder Mine with a nonunion work force of 500 employees (J.A. 7-8).[2] The mine, a large coal mine located near Wright, Wyoming, has been in operation since 1977 (J.A. 8). Thunder Basin has never recognized any union as a representative

[2] References to "J.A." are to the joint appendix.

of its employees under the NLRA. Its employees specifically rejected the United Mine Workers of America ("UMWA") as their representative by a vote of 307 to 56 in a National Labor Relations Board ("NLRB") election in 1987, the only representation election held at Thunder Basin by the NLRB. Thunder Basin has consistently exercised its right under the NLRA to deny nonemployee union organizers access to its records and property (J.A. 8-9).

A. UMWA Use of The Mine Act For Representational Purposes

In 1990, the UMWA initiated a new organizing tactic at Thunder Basin and other neighboring mines. It sought to have one of its staff union organizers and another UMWA employee, as well as the union itself (hereinafter collectively referred to as "UMWA"), designated under the Mine Act as a "representative of miners" (the "UMWA Designation").[3] The Mine Safety and Health Administration ("MSHA"),[4] without affording Thunder Basin any hearing opportunity, granted the requested UMWA Designation (J.A. 11-13).

The designation "representative of miners" gives the UMWA broad access to the operations of the mine, its records, and its employees. A representative of miners has the right to request that MSHA inspect a mine and to accompany MSHA inspectors in conducting the physical examination of the mine (30 U.S.C. § 813(f), (g)). The representative may participate in pre- and post-inspection conferences and has the opportunity to review many internal mine operations records (30 U.S.C.

[3] The Act provides certain rights to "a representative authorized by . . . miners." 30 U.S.C. § 813(f). MSHA's implementing regulations provide that "any person or organization which *represents* two or more miners" may be a "representative of miners." 30 C.F.R. § 40.1(b)(1) (emphasis added).

[4] Respondents are hereafter collectively referred to as "MSHA."

§ 813(c), (f)).[5] A representative of miners also can initiate and participate in certain administrative proceedings against the mine operator under the Mine Act.[6] Designation as a representative of miners is permanent, and can be withdrawn only by the representative personally (30 C.F.R. § 40.5).

B. MSHA Insistence on UMWA Designation

MSHA directed Thunder Basin to honor the UMWA Designation. Thunder Basin protested, emphasizing that the UMWA Designation was nothing more than a further attempt to unionize Thunder Basin's employees (J.A. 12-13, 31-33). The protest pointed out that the rights granted the UMWA and its staff organizer and staff employee—neither of whom are Thunder Basin employees —compromised Thunder Basin's rights under the NLRA and abused the purposes of the Mine Act (J.A. 31-33).

MSHA rejected Thunder Basin's protest and advised Thunder Basin that it must honor the UMWA Designation (J.A. 12-13, 49-50). MSHA confirmed that if Thunder Basin failed to comply with the UMWA Designation, MSHA would issue a citation (J.A. 13-14, 48).

[5] The records include those of certified and qualified mine personnel (30 C.F.R. § 77.106), records of testing, examination or maintenance of a variety of equipment (30 C.F.R. §§ 77.704-8, 77.800-2, 77.900-2, 77.104, 77.1110, 77.1403, 77.1404, 77.1433, 77.1606, and 77.1906), records of evacuation plans (30 C.F.R. § 77.1101), and daily inspection reports (30 C.F.R. § 77.1713).

[6] In addition to the right to request inspections (30 U.S.C. § 813(g)) and receive copies of documents which MSHA sends to a mine operator (30 U.S.C. § 819(b)), the representative of miners can challenge the issuance, modification or termination of certain enforcement actions against a mine operator and contest the reasonableness of time a mine operator is given to correct alleged violations of Mine Act regulations (30 U.S.C. §§ 815(d), 817(e)). A representative of miners may also initiate proceedings to modify the application of regulations under 30 C.F.R. Part 44, participate as a party in those proceedings and in proceedings before the Federal Mine Safety and Health Review Commission (29 C.F.R. § 2700.4) and file and maintain an action prohibiting discrimination under 30 U.S.C. § 815(c).

C. Mine Act Enforcement By MSHA For Failure to Honor UMWA Designation

Thunder Basin can challenge the UMWA Designation only by refusing to comply with MSHA's order and receiving a citation from MSHA.[7] A mine operator may challenge the citation (30 U.S.C. § 815(d)) in an administrative hearing before an Administrative Law Judge (30 U.S.C. § 823(d)(1)), subject to further review by the Federal Mine Safety and Health Review Commission ("Review Commission") (30 U.S.C. § 823(d)(2)) and judicial review by the courts of appeals (30 U.S.C. § 816(a)(1)).[8]

If the citation is upheld, a civil penalty, which can be up to $50,000, must be assessed (30 U.S.C. § 820(a)), and criminal penalties may also be imposed on individuals and the company (30 U.S.C. § 820(c), (d)).[9] If a mine operator does not promptly correct the alleged violation to MSHA's satisfaction, a failure to abate order can issue closing the mine area affected (30 U.S.C.

[7] *See Kaiser Coal Corp. v. Secretary of Labor*, 10 FMSHRC 1165 (1988) (Administrative law judge and the Review Commission do not have jurisdiction to issue declaratory judgments absent the issuance of citation); *Secretary of Labor v. Mid-Continent Resources, Inc.*, 12 FMSHRC 949 (1990) (refusing to issue a declaratory ruling on whether the NLRA precludes MSHA from designating the UMWA as miners' representative where no citation enforcement proceeding was pending).

[8] The court of appeals' review is limited to the administrative record developed below (30 U.S.C. § 816(a)(1)). The Review Commission's factual findings are deemed "conclusive" if supported by substantial evidence (*id.*).

[9] The amount of penalty assessable is governed by criteria in the Mine Act (30 U.S.C. §§ 815(b) and 820(i)) and MSHA regulations (30 C.F.R. §§ 100.1-100.8). Provision is made for specific increases in the penalty "where the operator does not abate within the time set by the inspector" (30 C.F.R. 100.3(f)). Failure to abate within the time set by the inspector also precludes qualifying for special lower penalties for violations that are not reasonably likely to result in serious injury or illness (30 C.F.R. § 100.4).

§ 814(b)). In addition, a failure to abate the violation creates the risk of civil penalties of up to $5,000 for each day of non-compliance (30 U.S.C. § 820(b)). A mine operator seeking challenge to a MSHA citation may avoid the imposition of daily penalties for non-compliance only by abating the alleged violation to MSHA's satisfaction in continuing to protest the citation in the administrative enforcement proceeding.

Thunder Basin's refusal to honor the UMWA Designation exposed it to MSHA's enforcement proceedings and serious penalties for non-compliance. Thunder Basin was aware that, contemporaneous with the events giving rise to the instant case, MSHA had explicitly threatened to impose the maximum allowable daily penalties against a neighboring nonunion mine operated by Kerr-McGee Coal Corporation ("Kerr-McGee") for failing to honor a similar UMWA Designation (J.A. 39-45). MSHA issued a citation and, upon determining that Kerr-McGee was refusing to honor the UMWA Designation, MSHA's inspector gave Kerr-McGee 15 minutes to comply (J.A. 36). When Kerr-McGee maintained its objection, MSHA issued a "no area affected" closure order for failure to abate within a reasonable time (*id.*). Even though MSHA understood that Kerr-McGee was asserting that the UMWA Designation compromised Kerr-McGee's NLRA rights and abused the purposes of the Mine Act (J.A. 43), MSHA nevertheless, on January 2, 1991, demanded abatement of the violation within 24-hours (J.A. 42-43) and threatened to impose the maximum allowable daily penalty, contending that Kerr-McGee's "continuous refusal to comply with the order demonstrates an apparent defiance to MSHA's enforcement sanctions" (J.A. 39) and "blatantly ignor[es] the agency's order to abate" (J.A. 40). Under the explicit threat of daily penalties, Kerr-McGee immediately capitulated and honored the UMWA Designation under protest while it litigated its objection to the citation in the enforcement proceedings

(J.A. 44).[10] Two months later, on March 11, 1991, MSHA wrote to Thunder Basin insisting that the UMWA Designation at Thunder Basin's mine be honored (J.A. 49-50).

II. THE PROCEEDINGS BELOW

Faced with the same circumstances as Kerr-McGee—an explicit threat of a citation, potential severe penalties, including daily penalties during an administrative proceeding, and a long series of administrative and review proceedings to endeavor to protect its NLRA right to exclude nonemployee union organizers from its mine—Thunder Basin sought injunctive relief in federal district court before a citation issued.[11] Thunder Basin's complaint for injunctive and declaratory relief challenged MSHA's demand that it honor the UMWA Designation, asserting that MSHA had erroneously applied the term "represents" in 30 C.F.R. § 40.1(b)(1) by failing to construe the term in light of the employers' and employees' rights under the NLRA (J.A. 13-16). Thunder Basin alleged MSHA was seeking, by threat of substantial penalties, to coerce Thunder Basin to abandon its NLRA right to keep union organizers off its premises and to distort the balance in labor-management rights struck by Congress (J.A. 7-8). Thunder Basin further alleged that MSHA's coercive conduct, through use of the threat of severe sanctions to compel Thunder Basin to waive its NLRA rights before any administrative hearing, constituted a denial of due process of law in violation

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[10] Kerr-McGee's protest of the citation was ultimately rejected by the Administrative Law Judge, and that rejection was affirmed by the Review Commission. *Kerr-McGee Coal Corp. v. Secretary of Labor, Mine Safety & Health Admin.*, 15 FMSHRC ——, 1993 OSHD (CCH) ¶ 30,013 (1993), *appeal pending*, Case No. 93-1250 (D.C. Cir.).

[11] MSHA acknowledged at the preliminary injunction hearing that it was prepared to issue a citation and proceed against Thunder Basin in the same manner as it had with Kerr-McGee (J.A. 47-48).

of the Constitution (J.A. 16). Thunder Basin also pointed out that the Review Commission had previously refused to construe the Mine Act with reference to federal labor law (J.A. 14-15).[12] The district court's jurisdiction was invoked pursuant to 28 U.S.C. § 1331 because the controversy arose under the laws of the United States, including the NLRA, the Mine Act and the U.S. Constitution (J.A. 6-7).

After a hearing, the district court found irreparable harm and granted a preliminary injunction precluding MSHA from requiring Thunder Basin to comply with the UMWA Designation pending a full hearing on whether the UMWA could properly be a representative of miners under the Mine Act consistent with Thunder Basin's NLRA rights (Pet. App. 24-30). It concluded (Pet. App. 28):

> Plaintiff has also shown that the UMWA's alleged interest in mine safety and health may be merely a ruse for gaining entry to plaintiff's Black Thunder property to attempt union organization efforts. Such potential abuse of MSHA by the UMWA poses the risk of serious harm to plaintiff.

The district court also found the administrative remedies would not adequately prevent this harm (Pet. App. 28):

> Additionally, plaintiff has demonstrated that it will be subject to considerable fines and penalties, some levied on a daily basis, if it stands on its LMRA [NLRA] rights and refuses to post the UMWA representative designation. Plaintiff could seek administrative remedies, but only after a MSHA citation has issued, and would be forced to proceed through

[12] *See also UMWA v. Peabody Coal*, 7 FMSHRC Dec. 1357 (1985) and *Secretary of Labor and UMWA v. Jim Walter Resources*, 7 FMSHRC Dec. 1348 (1985) (refusing to consider issues arising under the NLRA), *consolidated and aff'd*, 822 F.2d 1134 (D.C. Cir. 1987).

> administrative channels while such penalties accrued. Given this situation, it is apparent that plaintiff may suffer irreparably without injunctive relief.[13]

The Court of Appeals for the Tenth Circuit reversed the preliminary injunction order, holding that the district court lacked subject matter jurisdiction to prevent the allegedly improper administrative action by MSHA. Focusing on the Mine Act's grant of jurisdiction to the circuit courts over Review Commission orders, the court of appeals concluded that Congress had intended to preclude district court jurisdiction to review pre-enforcement challenges to administrative action, even if based on constitutional or other statutory grounds (Pet. App. 1-16).[14] The court of appeals limited its decision to the issue of jurisdiction and did not reach the merits of the preliminary injunction determination (Pet. App. 2, 7-8).

Thunder Basin petitioned for a writ of certiorari from this Court, citing a direct conflict between the Tenth

[13] Subsequently, the district court denied the government's motion to dismiss the complaint for lack of subject matter jurisdiction and failure to exhaust administrative remedies. The district court found the Mine Act administrative review process did not provide the appropriate forum for consideration of Thunder Basin's claims (Pet. App. 19-23). In rejecting the claim that Thunder Basin must first exhaust its administrative remedies under the Mine Act, the district court reasoned that Thunder Basin's statutory conflict and due process claims are outside the special expertise of the Review Commission, and therefore that exhaustion is unnecessary where, as here, a party challenges an agency's procedures on constitutional grounds (Pet. App. 22).

[14] The court of appeals further rejected the district court's finding that administrative remedies were not adequate to protect Thunder Basin's due process rights, noting that a hearing is provided before any penalty is imposed (Pet. App. 12). The court of appeals dismissed the likelihood that Thunder Basin would be subjected to substantial civil or criminal penalties, relying upon MSHA's assurances in briefs before the court that in a "factually close case" stiff supplemental penalties would not be imposed where a genuine interpretative question was raised and that criminal penalties are "unlikely" (Pet. App. 12-13).

Circuit's decision and *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693 (6th Cir. 1985), *amended*, 781 F.2d 57 (6th Cir. 1986), which held that district courts had jurisdiction to consider a pre-enforcement claim that certain Mine Act procedures violated a mine operator's due process rights.[15] The court of appeals in the case below expressly repudiated the reasoning of *Southern Ohio Coal* that district courts had jurisdiction to consider constitutional challenges to Mine Act procedures. Thunder Basin also cited the conflict between the Tenth Circuit's decision and *Bituminous Coal Operators' Ass'n, Inc. v. Secretary of Interior*, 547 F.2d 240 (4th Cir. 1977).

SUMMARY OF ARGUMENT

This Court has consistently found jurisdiction lies in federal district courts to hear pre-enforcement and collateral challenges to final agency action absent clear evidence that Congress intended to preclude such challenges. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967); *Traynor v. Turnage*, 485 U.S. 535 (1988);

[15] The district court had relied on *Southern Ohio Coal* and had quoted extensively from that opinion in reasoning that it had jurisdiction to consider the constitutional and statutory conflict challenges raised by Thunder Basin's complaint, as follows:

> Under the Mine Act, the courts of appeals and not the district courts have jurisdiction to review the Commission's orders. 30 U.S.C. § 816. *The Act, however, does not expressly preclude district court jurisdiction* . . . [W]hen the issue to be adjudicated is one that is within the domain of agency expertise, then the statutorily provided judicial review procedure is exclusive. *Questions concerning the constitutionality of rules or statutes, however, are not the type of questions that are within an agency's domain of expertise. Rather, responsibility to deal with questions of constitutional interpretation lies in the federal courts, both at the trial and appellate levels.* (Emphasis added by the district court.)

(Pet. App. 21-22) (*quoting* from *Southern Ohio Coal*, 774 F.2d at 700).

Mathews v. Eldridge, 424 U.S. 319 (1976); *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991). Thunder Basin's challenge to MSHA's action here falls squarely within this precedent.

1. Nothing in the statutory language or the legislative history of the Mine Act evinces a Congressional intent to preclude the pre-enforcement and collateral challenges brought by Thunder Basin. The Mine Act's provisions for court of appeals review of final orders of the Review Commission do not preclude pre-enforcement and collateral challenges of MSHA's actions in district court where justiciable federal question issues are presented. *Abbott Laboratories* holds that such a scheme of appellate review does no more than evince a legislative intention "to assure adequate judicial review of such agency decisions, and . . . does not manifest a congressional purpose to eliminate judicial review of other kinds of [challenges to] agency action." 387 U.S. at 144. Indeed, because the jurisdiction of the court of appeals is specifically limited to considering final orders of the Review Commission, the hearings/appeal provisions of the Mine Act support the conclusion that Congress intended to retain the general federal question jurisdiction of the district courts to hear pre-enforcement and collateral challenges.

The legislative history of the Mine Act further supports the conclusion that the district court had jurisdiction here. The legislative history shows that Congress was well aware that the predecessor to the Mine Act (the Coal Act) had been construed to allow pre-enforcement review by district courts. *Bituminous Coal Operators' Ass'n v. Secretary of Interior*, 547 F.2d 240, 243 (4th Cir. 1977). Significantly, in drafting the Mine Act, Congress did not act to reverse *Bituminous Coal* when it adopted the Coal Act's hearing/appellate review provisions for the Mine Act, thereby indicating that it intended to allow pre-enforcement challenges as raised in *Bituminous Coal* to continue under the Mine Act. *Lorrillard v. Pons*, 434

U.S. 575, 580-81 (1978). In the absence of any evidence of a contrary intention, there is no clear and convincing evidence of a legislative intention in the Mine Act to preclude pre-enforcement and collateral challenges in federal district courts.

2. Thunder Basin's complaint under 28 U.S.C. § 1331 raised substantial claims of statutory conflict and constitutional deprivation appropriate for the grant of federal question jurisdiction, and the claims were justiciable and ripe for judicial review.

(a) Administrative action in derogation of a statutory right is a clear basis for federal question jurisdiction. *Traynor v. Turnage*, 485 U.S. 535 (1988); *Oestereich v. Selective Serv. Sys. Local Bd.*, 393 U.S. 233 (1968); *Leedom v. Kyne*, 358 U.S. 184 (1958). Here, Thunder Basin presented a substantial claim that a reviewable statutory conflict existed because MSHA's UMWA Designation directly conflicted with Thunder Basin's right under the NLRA "to exclude nonemployee union organizers from his property." *Lechmere, Inc. v. NLRB*, —— *U.S.* ——, 112 S. Ct. 841, 845 (1992). Pre-enforcement judicial review of this statutory conflict is particularly appropriate here because MSHA and the Review Commission have no expertise, nor any interest, in interpreting and applying the NLRA. Under these circumstances, where agency action has failed to recognize rights protected under another statute outside the exclusive domain of the agency, this Court has held that federal question jurisdiction exists to resolve the statutory conflict. *Traynor v. Turnage, supra.*

(b) Thunder Basin's complaint also charged that the administrative citation and review procedures under the Mine Act violate the Due Process clause, as applied here. The coercive power of the threatened statutory penalties—and particularly MSHA's strong-arm tactic of threatening to impose penalties of up to $5,000 per day for refusal to submit immediately to MSHA's UMWA Designation

order—would effectively force Thunder Basin to relinquish its clear and protected NLRA rights even before the administrative review process has begun, thereby depriving it of a "meaningful" opportunity to obtain effective review of the designation order and the citation enforcing it. *Mathews v. Eldridge*, 424 U.S. at 331. This coercion is more than merely hypothetical. MSHA used the threat of mounting daily penalties to obtain the rapid capitulation of Kerr-McGee in the same circumstances just a few months prior to the events giving rise to the complaint in this case. The forced relinquishment of NLRA rights by threatened imposition of severe penalties during the administrative process raised a sufficiently justiciable claim to have the constitutional challenge heard by the district court under Section 1331. The Due Process claim is collateral to the question of the merits of Thunder Basin's opposition to MSHA's UMWA Designation and, therefore, raised a separate legal question over which the district court had clear jurisdiction to decide. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991); *Mathews v. Eldridge, supra.*

(c) The statutory and constitutional challenges raised in the complaint were justiciable and ripe for review under *Abbott Laboratories* and its progeny. Thunder Basin's challenge to MSHA's UMWA Designation raised purely legal issues: the interrelationship of the Mine Act and the NLRA, and the constitutionality of the Mine Act administrative procedures in the circumstances here. MSHA's UMWA Designation constituted a final decision for purposes of judicial review: it represented the MSHA's unequivocal position to which Thunder Basin was expected to modify its day-to-day business conduct or face agency enforcement. Because MSHA's UMWA Designation represented the culmination of MSHA consideration of the matter, with enforcement proceedings in the wings, Thunder Basin was not required to exhaust further administrative procedures by pursuing constitutionally-

defective enforcement hearings before the Review Commission. Once the Court has determined that the pre-enforcement review is not barred by the Mine Act and that the matter is ripe for review under *Abbott Laboratories*, the question of further exhaustion of administrative remedies is already answered: the particular agency action under judicial review was already "final" for purposes of judicial review and was not subject to further administrative revision prior to enforcement. Further, this case falls into the well-established exceptions to the exhaustion doctrine. *See Coit Indep. Joint Venture v. Federal Sav. & Loan, Inc. Co.*, 489 U.S. 561, 585 (1989); *Reiter v. Cooper*, —— U.S. ——, 122 L.Ed.2d 604 (1993); *McCarthy v. Madigan*, —— U.S. ——, 117 L.Ed.2d 291 (1992).

3. The conclusion of the court of appeals that the district court lacked jurisdiction was predicated on fundamental errors—most significantly the failure to subject this case to the analytical framework established by this Court's precedent on pre-enforcement judicial review and collateral challenges. The judgment of the court of appeals dismissing the action for lack of subject matter jurisdiction should be reversed and the matter remanded for consideration on the merits.

ARGUMENT

I. INTRODUCTION: FEDERAL DISTRICT COURTS HAVE JURISDICTION TO HEAR PRE-ENFORCEMENT AND COLLATERAL CHALLENGES TO ADMINISTRATIVE ACTION ABSENT CLEAR AND CONVINCING EVIDENCE THAT CONGRESS INTENDED TO PRECLUDE SUCH ACTION.

A. The Issue Presented.

This case stems from MSHA's stringent application of its narrow regulatory interests without regard to the effect on statutory rights emanating from legislative judgments outside the agency's domain of expertise. MSHA, interpreting its regulations, insisted that Thunder Basin accept the UMWA and its professional organizers as "miner representatives" entitled to participate in safety inspections and related activities at its mine. Thunder Basin, whose nonunion employees overwhelmingly rejected the UMWA in an NLRB election, objected on the grounds that federal labor law permits it to keep non-employee union organizers off its premises and out of its records. MSHA's action subjected Thunder Basin to two stark choices: either abandon its NLRA right or defend itself in enforcement proceedings at the risk of civil and criminal penalties, including daily penalties for failing to abate the violation to MSHA's satisfaction after receiving a citation.

Recognizing that MSHA had no expertise in or inclination toward accommodating the conflicting statutory interests, Thunder Basin sought relief in federal district court before MSHA issued a citation. The question presented here is whether district court jurisdiction exists under 28 U.S.C. § 1331 to hear Thunder Basin's pre-enforcement and collateral challenge to MSHA's actions.

B. The Controlling Principles.

The controlling legal principles have been recognized by this Court on many occasions. This Court has "re-

peatedly acknowledged 'the strong presumption that Congress intends judicial review of administrative action.' *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 670 (1986)." *Traynor v. Turnage,* 485 U.S. 535, 542 (1988). It has also repeatedly held this presumption "may be overcome 'only upon a showing of clear and convincing evidence of a contrary legislative intent.' *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967)." *Traynor,* 485 U.S. at 542. "[A]n aggrieved person will not be cut off [from judicial review] unless there is a persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories,* 387 U.S. at 140.

The presumption of judicial review is equally applicable to pre-enforcement challenges to administrative actions. Even where a statute provides for judicial review of agency determinations directly in the courts of appeals, pre-enforcement challenges in federal district court are appropriate absent "clear and convincing evidence" that Congress intended to preclude the action. *Abbott Laboratories v. Garder, supra; Gardner v. Toilet Goods Ass'n,* 387 U.S. 167 (1967).

Similarly, federal district courts have jurisdiction on the same basis to hear collateral challenges to agency actions on federal question and constitutional grounds. Where agency action has failed to recognize rights protected under another statute outside the exclusive domain of the agency, this Court has granted jurisdiction even in the face of statutory language limiting court review. *Traynor v. Turnage, supra.* And, where agency action has usurped a statutory right, jurisdiction has been found even though the statute limited court access. *Leedom v. Kyne,* 358 U.S. 184 (1958); *Oestereich v. Selective Serv. Sys. Local Bd.,* 393 U.S. 233 (1968). The Court has consistently found jurisdiction to hear collateral challenges to agency action on constitutional grounds absent clear and convincing evidence that Congress intended to preclude the action. *McNary v. Haitian Refugee Ctr.,*

498 U.S. 479 (1991); *Mathews v. Eldridge,* 424 U.S. 319 (1976).

Accordingly, these principles establish the presence of jurisdiction over this controversy unless the Mine Act precludes the action or Thunder Basin has failed to establish a justiciable claim of statutory conflict or constitutional infirmity. We demonstrate below that the Mine Act does not preclude jurisdiction over Thunder Basin's action, that the action raises justiciable issues under 28 U.S.C. § 1331 and that the Tenth Circuit, in finding no jurisdiction over the controversy, failed to apply the standards required by this Court in making that determination.

II. THE MINE ACT DOES NOT PRECLUDE PRE-ENFORCEMENT AND COLLATERAL CHALLENGES IN FEDERAL DISTRICT COURT.

Pre-enforcement and collateral challenges to agency action in federal district courts can be precluded only where there is "persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner,* 387 U.S. at 144. The "persuasive reason" necessary for preclusion was defined in *Abbott Laboratories* as "a showing of 'clear and convincing evidence' of a contrary legislative intent." *Id.* at 141 (quoting *Rusk v. Cort,* 369 U.S. 367, 379-80 (1962)). No such legislative intent can be ascertained from the Mine Act or its legislative history.

A. The Language of the Mine Act Suggests No Preclusion Intention.

Like the statute in *Abbott Laboratories,* the Mine Act contains "no explicit statutory authority" precluding pre-enforcement or collateral review. 387 U.S. at 141. *See Southern Ohio Coal Co. v. Donovan,* 774 F.2d 693, 700 (6th Cir. 1985) (the Mine Act "does not expressly preclude district court jurisdiction"); *Bituminous Coal Operators' Ass'n v. Secretary of Interior,* 547 F.2d 240, 243

(4th Cir. 1977) (appellate review provisions under the Coal Act, predecessor to Mine Act, did not preclude pre-enforcement judicial review because the Act neither stated nor implied that the appellate review procedure was to be exclusive).[16]

Nor does the statutory language imply any intention to preclude pre-enforcement challenges in federal district courts. In devising the administrative scheme of the Mine Act, Congress placed the essential administrative responsibility on the Secretary of Labor[17] and reserved quasi-judicial functions for the Review Commission where a citation or proposed assessment of penalty was contested (30 U.S.C. §§ 814 and 815). In matters before the Review Commission, Congress provided for a hearing, findings of fact and a decision and order on each contested issue (Section 815(d)). Congress provided that any person affected or aggrieved by a Commission order "may obtain review of such order" in the United States Court of Appeals (Section 816(a)).

This language does not manifest a legislative intention to preclude statutory conflict and constitutional challenges in the pre-enforcement context here. The provision in Section 816(a) calling for appellate review of a Commission "order" certainly cannot be fairly read as indicat-

[16] As discussed at pp. 22-23 *infra*, Congress was aware of the *Bituminous Coal* decision allowing pre-enforcement judicial review in the district courts when it adopted the Coal Act's administrative hearing/appellate review provisions in the Mine Act.

[17] The Secretary, whose functions are administered by MSHA, has responsibility under the Act to develop and promulgate mandatory health and safety standards (30 U.S.C. § 811), to conduct inspections and investigations of mines (§ 813), to issue citations and orders requiring withdrawal of miners from sections of the mine (§ 814), and to notify mine operators of proposed penalties for asserted safety and health violations (§ 815). Where MSHA's administrative determinations on citations and penalties are uncontested, Congress provided that they be deemed "final" and specifically provided they be "not subject to review by any court or agency" (§§ 815(a), 815(b)(1)(A)).

ing any intention to preclude pre-enforcement actions. By its express language, Section 816(a) applies only to review of orders issued by the Review Commission. Use of the words "order . . . issued under this Chapter," and "questions determined therein" in Section 816(a) modify appellate jurisdiction and indicate only that Congress intended that Review Commission decisions reach the courts of appeals after a full record is developed. As this Court concluded with respect to similar appellate review language in *Abbott Laboratories*, 387 U.S. at 144, such a provision does no more than evince a legislative intention "to assure adequate judicial review of such agency decisions, and . . . does not manifest a congressional purpose to eliminate judicial review of other kinds of [challenges to] agency action."[18]

The language of Section 816(a), in limiting appellate review only to final orders of the Review Commission, can be more fairly read as supporting an intention to allow pre-enforcement review in federal district courts where justiciable federal question issues are presented. That interpretation is consistent with this Court's presumption against preclusion absent clear evidence of a contrary intention. Moreover, this interpretation of the language is supported by the legislative history, discussed *infra* at pp. 21-23, showing that Congress, in incorporating into the Mine Act the appellate review provi-

[18] An expansion of exclusive appellate jurisdiction beyond "orders issued under this Chapter" not only ignores the plain language of the statute, but also runs counter to the Court's decision in *Johnson v. Robison*, 415 U.S. 360, 367 (1974), and *Traynor*, 485 U.S. 540. In those cases, the Court held that 38 U.S.C. § 211(a), which barred judicial review of "the decisions of the administrator on any questions of law or fact under any law administered by the Veterans' Administration . . ." did not bar federal courts from jurisdiction over constitutional and statutory conflict challenges to veterans' benefit legislation. The Court reasoned that constitutional and statutory conflict claims do not arise under the veterans' benefit legislation. Thunder Basin's similar claims of constitutional and statutory conflict likewise do not arise under the Mine Act.

sions of the prior Coal Act, knowingly let stand *Bituminous Coal*, 547 F.2d 240, permiting federal question jurisdiction in the district court under the Coal Act.

As this Court has noted, "when Congress intends to bar judicial review" it employs unambiguous language to that end. *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 779-80 (1985). *See McNary v. Haitian Refugee Ctr.*, 498 U.S. at 479 (1991).[19] Indeed, Congress in the Mine Act specifically precluded *any* court review of MSHA determinations not contested within fixed time periods (30 US.C. § 815(b)(1)(A)) and in another section flatly stated that "no justice, judge or court of the United States shall" enjoin the enforcement of interim mandatory health or safety standards issued by the Secretary (30 U.S.C. § 960). These specific preclusions of court review in the Mine Act contrast sharply with the absence of any language of similar preclusion for the pre-enforcement and collateral challenges raised here. The failure of Congress to include an explicit bar to pre-enforcement and collateral challenges in district courts evinces a legislative intention not to preclude such challenges that are otherwise justiciable under established legal principles. This evident intention is further supported by a detailed analysis of the legislative history of the Mine Act.

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[19] Had Congress intended Section 816 to be preclusive, statutory language to plainly express such an intent was readily at hand. *See, e.g.*, 42 U.S.C. § 405(h) ("No action against the United States, the Secretary, or an officer or employee thereof shall be brought under Section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter."); 38 U.S.C. § 511(a) ("the Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. . . . [t]he decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court whether by an action in the nature of mandamus or otherwise.").

B. The Legislative History Supports A Legislative Intention to Permit Pre-Enforcement And Collateral Challenges.

The Mine Act, passed on November 9, 1977, had three primary purposes: (1) it combined all federal mine safety and health programs under a single statute (abolishing the Coal Mine Health and Safety Act of 1969 and the Metal and Nonmetallic Safety Act of 1966), (2) it transferred the administration of the program from the Department of Interior to the Department of Labor and created an independent Federal Mine Safety and Health Review Commission to replace the Department of Interior's Board of Appeals, and (3) it sought to provide a more effective program of standard setting and enforcement. 123 Cong. Rec. 19,927 (1977), reprinted in Subcomm. on Labor of the Comm. on Human Resources, 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 (Comm. Print 1978) ("Leg. Hist." herein) at 909 (statement of Senator Javits, a proponent of the Senate bill which was adopted by both houses). Only the last point has relevance here. As shown below, the legislative history of the Mine Act supports a legislative intention to allow jurisdiction over statutory conflict and constitutional pre-enforcement challenges like those presented here.

The enforcement language adopted in the Mine Act derived from the Senate bill (S. 717), which in turn based "its enforcement approach on the Coal Act." 123 Cong. Rec. 19,927 (1977), reprinted in Leg. Hist. at 905 (1978) (statement of Sen. Williams, floor manager for the bill).[20] The enforcement procedure in S. 717 was substantially the same as that under the Coal Act. The enforcement mechanism in the bill still required an

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[20] See also S. Rept. 181, 95th Cong., 1st Sess. p. 34 (1977) ("Sen. Comm. Rpt." herein), reprinted in Leg. Hist. at 622: ("The procedure for enforcement of the Act is based upon the procedure under the Coal Act.").

inspection, citation, hearing, decision and order, with review of "the order" in the circuit courts of appeal, just as in the Coal Act.[21] This enforcement mechanism under the Coal Act had been found not to preclude pre-enforcement review. *Bituminous Coal Operators Ass'n v. Secretary of Interior,* 547 F.2d at 243 ("Because the Act neither states nor implies that § 816(a) furnishes the exclusive procedure for obtaining judicial review, other procedures are not precluded").

Congress' incorporation of the Coal Act enforcement procedure into the Mine Act without language reversing *Bituminous Coal* provides strong support that Congress intended to allow pre-enforcement challenges in federal district court. As this Court has found:

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it enacts a statute without change, *see Albemarle Paper Co. v. Moody,* 422 U.S. 405, 414 n.8 (1975); *NLRB v. Gullett Gin Co.,* 340 U.S. 361, 366 (1955); *National Lead Co. v. United States,* 252 U.S. 140, 147 (1920); 2A C. Sands, Sutherland on Statutory Construction § 49.09 and cases cited (4th ed. 1973). So too, *where, as here, Congress adopts a new law incorporating sections of a prior law,* Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

Lorrillard v. Pons, 434 U.S. 575, 580-81 (1978) (emphasis added).

During the drafting and deliberation of the Mine Act, Congress was aware of the *Bituminous Coal* decision, citing it in the Senate Committee Report for approval of

[21] Sen. Comm. Rpt. pp. 34-41, in Leg. Hist. at 622-629. The Committee report makes clear that the review in the courts of appeals was intended to apply to "record reviews" of "final orders of the Commission." *Id.* at 40, in Leg. Hist. at 628.

the substantive aspects of the decision. Sen. Comm. Rpt. p. 14, in Leg. Hist. at 602. Congress' action in incorporating into the Mine Act, with minor amendment, the very provisions of the Coal Act which were subject to the *Bituminous Coal* decision, "without explicitly repealing" that decision, "gives rise to the presumption that Congress intended to embody" the *Bituminous Coal* decision in the new law. *Lindahl,* 470 U.S. at 782.[22]

In sum, no suggestion of preclusion of pre-enforcement or collateral challenges appears in the Mine Act. The only pertinent legislative history supports a legislative intent to permit pre-enforcement challenges.[23] In the ab-

[22] The Mine Act did change the judicial process for enforcement of penalty determinations. The Coal Act required the Secretary to seek enforcement, or the mine operator to seek review, of penalty determinations through a trial *de novo* in the federal district courts. Sen. Comm. Rpt. pp. 40-45, in Leg. Hist. at 628-633. The Mine Act eliminated the *de novo* trial and made penalty determinations reviewable in the circuit courts of appeals just like other Review Commission orders. The proponents of the bill urged this change for two basic reasons: (1) the U.S. Attorneys' offices were reluctant to bring enforcement cases for the relatively small amounts often involved and (2) the *de novo* trial requirement called for duplicative and wasteful hearings before both the agency and the federal district courts and substantially extended the collection time. *See* 123 Cong. Rec. 19,925 (1977), reprinted in Leg. Hist. at 88-89 (remarks of Sen. Williams); Sen. Comm. Rpt. pp. 15-16, 45 (May 16, 1977) in Leg. Hist. at 603-604, 633.

The legislative reasons behind the change in the enforcement of penalty determinations suggest nothing with respect to any intention of Congress to restrict access to federal district courts on pre-enforcement challenges. In the floor discussions and reports on this change, there was no discussion of an intention to preclude access to the general jurisdiction of the federal courts. Accordingly, this change provides no support for a congressional intent to preclude pre-enforcement challenges raising justiciable federal question issues.

[23] Importantly, no hint of such preclusion can be found in any of the debate concerning the Mine Act provisions. In fact, Senator Javits intimated to the contrary in explaining the bill to the Senate: in the process of explaining how the interests of mine operators

sence of any language or a legislative history demonstrating an intention to preclude access to the general jurisdiction of the federal district courts, there is no "clear and convincing evidence" that Congress intended the Mine Act to preclude Thunder Basin's pre-enforcement and collateral challenges here.

III. THUNDER BASIN PRESENTED A JUSTICIABLE CLAIM OF STATUTORY CONFLICT AND CONSTITUTIONAL INFIRMITY APPROPRIATE FOR FEDERAL QUESTION JURISDICTION.

Thunder Basin invoked jurisdiction under 28 U.S.C. § 1331 on the grounds that MSHA's actions exceeded its statutory authority and violated Thunder Basin's due process rights by insisting, under the threat of severe penalties and possible criminal liability, that Thunder Basin abandon an important statutory right granted through another statute as to which MSHA had no expertise. While the federal district court found a sufficient basis for the exercise of federal question jurisdiction, the Tenth Circuit disagreed. This Court has established the standard for determining whether federal question jurisdiction exists under Section 1331 as follows:

> For purposes of determining whether jurisdiction exists under § 1331(a) to resolve appellees' claims, it is not necessary to decide whether appellees' alleged cause of action against the NRC based directly on the Constitution is in fact a cause of action "on which [appellees] could actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946). Instead, the test is whether " 'the cause of action alleged is *so patently*

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were protected in the bill, he stated that the bill "expressly protects the right of mine operators to contest any standard, citation, penalty or order before the Mine Safety and Health Review Commission *or before the Federal courts*." 123 Cong. Rec. 19,927 (1977), reprinted in Leg. Hist. at 909 (emphasis added). Beyond this statement, nothing in the legislative history provides any specific indication of a legislative intent concerning the availability of federal question jurisdiction or pre-enforcement challenges under the Act.

> *without merit* as to justify . . . the court's dismissal for want of jurisdiction.' " *Hagans v. Lavine*, 415 U.S. 528, 542-543 (1974), quoting *Bell v. Hood, supra*, at 683. (Emphasis added). See also *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974) (test is whether right is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy"). In light of prior decisions, for example, *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) and *Hagans v. Lavine, supra*, as well as the general admonition that "where federally protected rights have been invaded . . . courts will be alert to adjust their remedies so as to grant the necessary relief," *Bell v. Hood, supra*, at 684, we conclude that appellees' allegations are sufficient to sustain jurisdiction under 1331(a).

Duke Power Co. v. Carolina Env. Study Group, Inc., 438 U.S. 59, 70-71 (1978).

Applying this standard, this Court has often found federal question jurisdiction under 1331(a) in cases where it ultimately denied relief on the merits. *See Johnson v. Robison*, 415 U.S. 361 (1974); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Duke Power Co. v. Carolina Env. Study Group, Inc.*, 438 U.S. 59 (1978). We show below that, under the appropriate standard, Thunder Basin presented a justiciable claim of statutory conflict and constitutional deprivation appropriate for the grant of federal question jurisdiction.

A. The Federal District Court Had Jurisdiction to Hear a Statutory Conflict Challenge Outside MSHA's Expertise.

Since the inception of the NLRA, the NLRB and the courts have recognized the "employer's right to exclude non-employee union organizers from his property." *Lechmere, Inc. v. NLRB*, —— U.S. ——, 112 S. Ct. 841,

845 (1992). *Accord, Hudgens v. NLRB*, 424 U.S. 507 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). This right has been limited only in the "rare case" where unique obstacles make the employees inaccessible to union communication efforts. *Lechmere, Inc.*, —— U.S. ——, 112 S. Ct. at 848. While this Court has on occasion overturned NLRB efforts to broaden the "inaccessibility" exception, there has been no dispute that Congress, in balancing the conflicting interests of employees and employers under the NLRA, provided the employer with the basic right, absent such unique circumstances, to exclude non-employee union organizers from his property. *Lechmere, Inc.*, —— U.S. at ——, 112 S. Ct. at 848; *Babcock & Wilcox*, 351 U.S. at 109-12.

The insistence of MSHA that Thunder Basin accept the UMWA Designation is a plain transgression of Thunder Basin's NLRA rights. MSHA cannot cloak its disregard for Thunder Basin's NLRA rights under any claim of specific statutory authority. The Mine Act has no provision that requires MSHA to approve a union and its professional organizers as a "representative of miners" at a nonunion mine. Nor is there any legislative history to that effect.[24] Absent specific language to that effect,

[24] The Tenth Circuit in a separate case has noted that Congress did not address the "precise issue" of whether non-employees could be designated as a representative of miners and that the legislative debate "focused on the importance of miners participating in inspections of the mines in which they work." *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447, 450-51 (10th Cir. 1990). Regardless of the correctness of that decision on the merits, it is clear that having not addressed the issue of non-employees in general, Congress did not address the narrower issue of whether non-employee union organizers and a union itself may be designated as a "representative of miners" at a nonunion mine.

there is no basis for assuming that the Mine Act overruled the NLRA in this key respect.[25]

MSHA's action here raises a justiciable claim under 28 U.S.C. § 1331(a). Administrative action in derogation of a statutory right is a clear basis for federal question jurisdiction. *Traynor v. Turnage*, 485 U.S. 535 (1988); *Oestereich v. Selective Serv. Sys. Local Bd.*, 393 U.S. 233 (1968); *Leedom v. Kyne*, 358 U.S. 184 (1958). An administrative agency has no authority to deprive persons of "a 'right' assured them by Congress" and "a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given." *Leedom v. Kyne*, 358 U.S. at 189.

Pre-enforcement judicial review is particularly appropriate here because MSHA and the Review Commission have no expertise in the matter. The purpose of limiting judicial review of administrative decisions is "to permit agency expertise to be brought to bear on particular problems." *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965). Here, that purpose is not served, for Thunder Basin's statutory conflict claims are outside the agency's domain of expertise. Thunder Basin's rights derive from another statute administered

[25] *See Traynor v. Turnage*, 485 U.S. 535, 547-48 (1988), where this Court specifically addressed the controlling principles in a similar context:

> Accordingly, petitioners can prevail under their Rehabilitation Act claim only if the 1978 legislation can be deemed to have implicitly repealed the "willful misconduct" provision of the 1977 [Veterans Act] legislation . . . . "They must thereby overcome the 'cardinal rule . . . that repeals by implication are not favored.'" *Morton v. Mancari*, 417 U.S. 535, 549-550 (1974) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)); [citations omitted]. . . . "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari, supra*, at 551.

and enforced by another administrative agency, the NLRB. MSHA and the Review Commission have no institutional experience or competence in recognizing the delicate balance Congress set between the rights of employees and employers in the NLRA, and thus cannot determine the destructive effect to that balance in granting a union advantages prohibited under the NLRA and in providing a union with the imprimatur of apparent government blessing as a legitimate representative of employees. Indeed, the Review Commission has declared in the recent *Kerr-McGee Coal* decision [26] that a mine operator, in asserting before the Review Commission its NLRA right to exclude non-employees from its premises, "is in the wrong forum" because the Review Commission's field of inquiry is limited to the Mine Act.[27]

In these circumstances the Court has found that jurisdiction exists for the district courts to resolve statutory conflict claims. For example, in *Traynor v. Turnage*, 485 U.S. 535, the Court found jurisdiction existed for district court review where it was alleged that regulations issued by the Veterans' Administration denying veterans benefits were inconsistent with rights granted under the Rehabilitation Act. Finding that the Rehabilitation Act

[26] *Kerr-McGee Coal Corp. v. Secretary of Labor, Mine Safety and Health Admin.*, 15 FMSHRC ——, 1993 OSHD (CCH) ¶ 30,013 (1993), appeal pending, Case No. 93-1250 (D.C. Cir.)

[27] *Kerr-McGee, supra*, 15 FMSHRC at ——, 1993 OSHD (CCH) at 41,114. The Review Commission's entire frame of reference for its decision was the Mine Act: ". . . nothing in the Mine Act or general principles of administrative law requires that the Secretary or the Commission defer to or incorporate the NLRA. Our proper field of judicial inquiry is the Mine Act." *Id.* at 41,113. The Review Commission found *Lechmere* irrelevant on the grounds that it had nothing to do with the Mine Act and did not reverse the development of law under the Mine Act regarding representatives of miners (*id.* at 41,113). The Review Commission's analysis completely fails to address the deprivation of Kerr-McGee's NLRA right; indeed, it endeavors to avoid developing the slightest understanding of employer/employee rights under the NLRA.

was outside the "exclusive domain" of the Veterans Administration and that there was no "reason to believe that the Veterans Administration has any special expertise" to assess its own regulations in light of the Rehabilitation Act, the Court concluded that jurisdiction was proper in the district court. *Traynor v. Turnage*, 485 U.S. at 544-45.[28]

The statutory conflict here arises in the same manner as in *Traynor*. MHSA applies and the Review Commission interprets the Mine Act in a manner inconsistent with and in derogation of Thunder Basin's rights under the NLRA, a statute outside and beyond the domain of expertise of either agency. Accordingly, Thunder Basin presents, under *Traynor*, a justiciable claim to have the statutory conflict resolved through resort to an original action under 28 U.S.C. § 1331(a).

B. The Federal District Court Had Jurisdiction To Hear Thunder Basin's Constitutional Claims.

The Due Process clause of the Fifth Amendment assures that persons not be deprived of protected rights without an opportunity to object at a "meaningful" hearing. See *Mathews v. Eldridge*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). As Justice Frankfurter emphasized in his concurring opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951):

[28] Indeed, the Court in *Traynor* found jurisdiction even though then Section 211(a) of the Veterans' Readjustment Benefit Act (now 38 U.S.C. § 511(a)) prohibited jurisdiction by any court to review a decision of the Administrator on any "question of law or fact under any law administered by the Veterans Administration." Notwithstanding the clear legislative intention to preclude certain kinds of actions, the Court found "no clear and convincing evidence of any congressional intent to to preclude a suit" in federal district court challenging the validity of the Administrator's determination in light of a different statute (485 U.S. at 543-44).

> [T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.

Thunder Basin's complaint charged that the administrative procedures under the Mine Act violate the Due Process clause by forcing Thunder Basin to relinquish its protected NLRA rights before any administrative hearing on its objection to MHSA's UMWA Designation, or face the risk of substantial civil and criminal penalties, including daily penalties for refusing to comply immediately with the designation order. As demonstrated below, the coercive power of the threatened statutory penalties—and particularly MSHA's strong-arm tactic of threatening to impose penalties of up to $5,000 per day for refusal to submit to MSHA's UMWA Designation—would effectively force Thunder Basin to relinquish its clear and protected NLRA right even before the Mine Act administrative review process had begun, thereby depriving it of a "meaningful" opportunity to obtain effective review of MSHA's UMWA Designation.

The Mine Act and its administrative enforcement procedures are geared towards assuring prompt compliance with the Mine Act and MSHA regulations; "willful" or continuing violations are punished with substantial civil and criminal penalties, including daily civil penalties for noncompliance.[29] The Mine Act and MSHA regulations increase penalties for mine operators who refuse promptly to abate a MSHA citation. While the emphasis in the Mine Act and MSHA regulations on quick abatement of cited violations may make good sense in the context of

[29] As noted *supra*, pp. 5-6 if the citation is upheld, a civil penalty of up to $50,000 must be assessed, a penalty of up to $5,000 per day for noncompliance may be assessed, and criminal penalties may be imposed on individuals and companies for knowing or willful violations. Failure to abate a violation within the time set by the agency leads to higher penalties under the criteria set forth in the Mine Act and MSHA regulations.

threats to mine safety, it deprives Thunder Basin of its constitutional right to a fair hearing when applied to the statutory conflict between MSHA's designation of the UMWA as miners' representative and Thunder Basin's right under the NLRA to exclude non-employee union organizers from its property and records. Thunder Basin can only avoid the risk of these increased penalties by promptly abating its continuing refusal to accept the UMWA Designation—thereby relinquishing its independent NLRA right during the administrative process. Thus, as applied to Thunder Basin's statutory claim, the Mine Act compels Thunder Basin to surrender the very right it sought to protect by the administrative proceedings.

Significantly, the Review Commission has held that a mine operator cannot obtain a declaratory judgment on a disputed issue without there first existing a MSHA citation for some violation.[30] Absent any pre-enforcement declaratory relief from the Review Commission, Thunder Basin can only enter the administrative process by resisting compliance with MSHA's UMWA Designation, thereby risking substantial civil and criminal penalties if it is not successful in the administrative proceeding.[31]

The coercive power of such threatened penalties cannot be doubted. Placed between "the rock and the whirlpool," *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967) (quoting *Union Pac. R.R. Co. v. Pub. Serv. Comm'n*, 348 U.S. 67, 69-70 (1918)), a litigant in the position of Thunder Basin will be coerced into giving up its protected

[30] See authorities cited at n.7, p. 5, *supra*.

[31] It should be clear that Thunder Basin is not challenging the general statutory review scheme of the Mine Act or the Review Commission procedures in the abstract. It is in the special instance here—where these procedures, and other administrative actions by MSHA, force Thunder Basin to give up a clear and separate right under another statutory scheme—that the constitutional problem raised by Thunder Basin's complaint is presented.

right in order to avoid the possible imposition of severe civil and criminal sanctions for its exercise.[32] Indeed, faced with the prospect of such penalties, few mine operators, if any, would be able to resist the pressure to relinquish their statutory rights no matter how confident they were of the correctness of their legal position on the merits.[33]

The threat that Mine Act penalties will be used as a club to obtain compliance by mine operators is far from hypothetical; MSHA did exactly that in a contemporaneous dispute between MSHA and Kerr-McGee, which, like Thunder Basin, objected to the designation of the UMWA and its organizers as miners' representative in

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[32] *See Union Pac. R.R. v. Public Serv. Comm'n*, 248 U.S. 67, 70 (1918):

> [A]s conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of failure to accept it, and then to declare the acceptance voluntary . . .

See also United States v. Jackson, 390 U.S. 570 (1968) (statute which made the death penalty applicable only to those who contested their guilt before a jury was unconstitutional); *Simmons v. United States*, 390 U.S. 377, 394 (1968) ("we find it intolerable that one constitutional right should have to be surrendered in order to assert another"); *Garrity v. New Jersey*, 385 U.S. 493 (1967) (statements by criminal defendant were inadmissible when made under threat of removal from public office for exercise of Fifth Amendment right against self-incrimination).

[33] *See Ex parte Young*, 209 U.S. 123, 146-47 (1908) (Due Process clause violated where railroads could challenge reasonableness of rates established by administrative agency only in defending a criminal prosection for filing to comply with prescribed rates). *See also Abbott Laboratories*, 387 U.S. at 152-53; *Gardner v. Toilet Goods Ass'n*, 387 U.S. at 172 (observing that the procedure for challenging FDA regulations through litigation involving risk of criminal penalties is "inadequate" as a satisfactory alternative to a pre-enforcement declaratory judgment action in district court).

violation of Kerr-McGee's NLRA rights (J.A. 39-45). MSHA not only demanded that the mine operator comply with MSHA's UMWA Designation order, it explicitly threatened to invoke maximum daily civil penalties under the Mine Act if Kerr-McGee did not comply *within 24 hours* (J.A. 42-43). Kerr-McGee capitulated immediately under this threat of mounting daily penalties and complied with the designation under protest (J.A. 44).

After Kerr-McGee surrendered under this threat, Thunder Basin fully expected to receive the same treatment when MSHA inspectors issued a citation.[34] Rather than subject itself to MSHA's demand for immediate relinquishment of its statutory right, Thunder Basin sought the protection of the judiciary to assure that it would obtain review of MSHA's UMWA Designation decision without being forced to relinquish its independent NLRA rights in the process.

The forced relinquishment of Thunder Basin's statutory right to keep UMWA organizers from its property reaches constitutional dimensions because these rights cannot be fully restored to Thunder Basin by a subsequent vindication of its NLRA rights in the administrative process. As the Court explained in *Mathews v. Eldridge*, 424 U.S. 319 (1976), a constitutional claim of a deprivation of a right before an adequate hearing rests on the proposition that the injury cannot be adequately remedied by a post-deprivation hearing (424 U.S. at 331).

Here, the forced relinquishment of Thunder Basin's NLRA right gives UMWA organizers access to the mine, mine records and Thunder Basin employees during an administrative process that can take several years to re-

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[34] The counsel of record in this case was also counsel for Kerr-McGee in its dealings with MSHA on the designation of UMWA and was directly involved in the threats communicated in that matter.

solve[35]. Thunder Basin contended in its complaint that UMWA sought the designation as miners' representative as part of its union organizing campaign (J.A. 12). The UMWA's recurring presence at the mine gives it credibility and formal contacts with employees that can spill over to benefit the union in another NLRA representation campaign and taint irreparably the relationships between Thunder Basin's management and its employees. In these circumstances, Thunder Basin will have suffered irreparable injury by relinquishing its NLRA rights, even if it is ultimately successful in its Mine Act claim; a belated restoration of its NLRA rights may not eliminate the advantage gained by the UMWA during the years of the administrative process and appeals. Thus, the forced relinquishment of Thunder Basin's NLRA rights raises the specter of the "risk of erroneous deprivation" of those rights during the administrative process. *See Mathews v. Eldridge*, 424 U.S. at 335; *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (one of the central concerns of the Due Process clause is prevention of unjustified or mistaken deprivations of rights).

In these circumstances, the Hobson's choice forced on Thunder Basin by MSHA—requiring an immediate abdication of its protected NLRA right at the beginning of the administrative process to avoid increased penalties for maintaining that right during the administrative proceedings—violates Thunder Basin's fundamental Fifth Amendment rights by effectively depriving Thunder Basin of a "meaningful" administrative hearing on its statutory-

[35] The parallel challenge to MSHA's designation of the UMWA as miners' representative at the Kerr-McGee mine next to Thunder Basin's mine has already taken more than 30 months from the citation to the Review Commission's decision, and review in the court of appeals is just commencing, with the likelihood of nearly another year before the matter is resolved by a court. During all of that time, UMWA organizers have had access rights to Kerr-McGee's premises, employees and records as the designated miners' representative under the Mine Act.

conflict claim. *See Mathews v. Eldridge*, 424 U.S. at 331. A Review Commission hearing to determine whether or not MSHA's UMWA Designation violates Thunder Basin's NLRA right can hardly be deemed constitutionally "adequate" when Thunder Basin has been coerced by the Mine Act's penalty provisions and MSHA enforcement tactics into relinquishing its NLRA right before the hearing has even begun, particularly where that right cannot be fully recovered by success in the administrative process.

Accordingly, the forced relinquishment of NLRA rights by threatened imposition of severe penalties during the administrative process—which troubled the court of appeals[36]—raises a sufficiently justiciable claim to have the constitutional challenge heard by the district court under Section 1331. The Due Process claim is collateral to the question of the merits of Thunder Basin's opposition to MSHA's UMWA Designation and, therefore, raises a separate legal question over which the district court had clear jurisdiction to decide. *See Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976) (finding jurisdiction where the constitutional claim to a right to a pretermination evidentiary hearing was "entirely collateral to [the] substantive claim of entitlement" and claimant

[36] The court of appeals stated (Pet. App. 13):

> Threats of such penalties in the face of a bona fide interpretative dispute are indeed troubling. Such daily penalties, however, may be constitutionally valid so long as the operator "is accorded adequate opportunity to challenge their assessment at the administrative level before payment must begin" (citation omitted).

The court of appeals' response entirely misses the point of MSHA's explicit threat and Kerr-McGee's immediate capitulation—to coerce the surrender of an important right under the NLRA. The fact that the penalty assessments may not be actually collected until the end of the hearing process is not relevant to the constitutional infirmity in the agency's threat of daily penalties for maintaining a separate statutory right leading to the forced relinquishment of statutory rights before the hearing has even begun.

has raised "at least a colorable" constitutional claim for resolution); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991); *Duke Power Co. v. Carolina Env. Study Group, Inc.*, 438 U.S. 59 (1978).[37]

C. The Case Is Ripe And Appropriate For Judicial Review.

This Court's landmark decision in *Abbott Laboratories* sets the framework for analysis of whether MSHA's UMWA Designation is appropriate for pre-enforcement judicial review. In *Abbott Laboratories*, the petitioners challenged labelling regulations of the Food and Drug Administration ("FDA") requiring drug manufacturers to print the generic name of a drug, as well as the proprietary name, on labels and advertising. In considering whether the controversy was ripe for judicial resolution, the Court considered two main questions: "the fitness of the issue for judicial decision and the hardship to the parties of withholding court decision." 387 U.S. at 149. The Court concluded that the issue was "fit" for judicial review, noting that the challenge to the FDA's regulation raised only a "purely legal issue" of the FDA's statutory authority and, therefore, did not require a fuller administrative record, that the regulations constituted "final" agency action in that the agency pronouncement was not subject to further administrative revision before the agency expected compliance and that the agency was prepared to seek to enforce its decision (*id.* at 149-52). Turning to the hardship on the parties from withholding immediate review, the Court observed that the agency action has a direct and immediate effect on the day-to-day

[37] See also *Public Util. Comm'n v. United States*, 355 U.S. 534, 540 (1958):

> [W]here the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right.

business of the regulated entities, requiring them either to comply or face the risk of serious criminal and civil penalties (*id.* at 152-54). The Court concluded:

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory ban or some other unusual circumstance.

Id. at 153. *Accord, Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967); *Bell v. New Jersey*, 461 U.S. 773 (1983); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986).

The present case fits squarely into this line of cases. We establish below that MSHA's UMWA Designation is plainly "ripe" for review as a final agency action which the agency intends to enforce. Further, we demonstrate that the administrative review procedure under the Mine Act is inadequate to consider the statutory and constitutional claims and need not be exhausted prior to judicial consideration.

1. *MSHA's UMWA Designation Is Ripe For Judicial Resolution.*

Thunder Basin's pre-enforcement challenge to MSHA's UMWA Designation raises purely legal issues: the interrelationship of the Mine Act and the NLRA, and the constitutionality of the Mine Act administrative procedures in the circumstances here. Thus, as the Court observed in *Toilet Goods Ass'n*, 387 U.S. at 171: "[T]his is not a situation in which consideration of the underlying legal issues would necessarily be facilitated if they were raised in the context of a specific attempt to enforce the regulations."

Further, MSHA's UMWA Designation decision constitutes a final decision for purposes of judicial review.

Under *Abbott Laboratories* and its progeny, agency action is considered final for judicial review when the agency publicly articulates an unequivocal position and expects regulated entities to alter their behavior or face agency enforcement. *Abbott Laboratories*, 387 U.S. at 152; *Toilet Goods Ass'n*, 387 U.S. at 171. Plainly MSHA's UMWA Designation meets that "pragmatic" test. *Abbott Laboraties*, 387 U.S. at 149.

MSHA's decision designating the UMWA as a representative of miners and requiring Thunder Basin to honor the UMWA Designation was not a tentative ruling, subject to further MSHA consideration before citation and enforcement proceedings would be instituted. At the time Thunder Basin sought judicial relief, it had already protested MSHA's UMWA Designation and had received a reply from MSHA's District Manager rejecting the objections and reiterating MSHA's position (J.A. 49-50). At the preliminary injunction hearing, MSHA testified that Thunder Basin would receive a citation and daily penalties if it failed to comply with MSHA's UMWA Designation (J.A. 48). Accordingly, MSHA's letter rejecting the protest was its final word on the issue "[s]hort of an enforcement action." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 586 (1980).[38]

The finality of MSHA's determination is further demonstrated by its handling of the identical issue at the neighboring Kerr-McGee mine in the same time frame. At Kerr-McGee, MSHA not only demanded that the mine operator comply with its UMWA Designation, it explicitly threatened to invoke daily civil penalties under the Mine Act if Kerr-McGee did not comply within 24 hours (J.A. 42-43)—a threat which led Kerr-McGee to

[38] The fact that MSHA had not yet begun to enforce its designation through the citation process is irrelevant to the conclusion that MSHA's designation order is itself sufficiently final for judicial review. Just as in *Abbott Laboratories*, and *Toilet Goods Ass'n*, the fact that the agency would eventually bring some enforcement action does not preclude review of the final agency decision upon which enforcement would be based.

capitulate and comply with that UMWA Designation under protest (J.A. 44). A more telling example of a final agency directive to which regulated entities must conform or face enforcement cannot be fashioned.

This case also meets the second part of the test for ripeness in *Abbott Laboratories*—*i.e.*, the effect on Thunder Basin in withholding pre-enforcement judicial review. The agency's action will have a direct impact on Thunder Basin. As in *Abbott Laboratories*, MSHA's UMWA Designation requires Thunder Basin to make significant changes in its everyday business practices, and subjects Thunder Basin to "the imposition of strong sanctions" if it fails to abide by MSHA's directive. 387 U.S. at 154. In these circumstances, as the Court found in *Abbott Laboratories*, the MSHA directive puts Thunder Basin in a "dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Abbott Laboratories*, 387 U.S. at 152.

Abbott Laboratories also disposes of one of the main points against review raised by the court of appeals—assurances by MSHA in appellate briefs that stiff civil and criminal penalties would not be imposed "if a genuine interpretation question was raised" as to the designation determination (Pet. App. 12-13). As *Abbott Laboratories* makes clear, however, such assurances—even by the Department of Justice—are insufficient to defeat jurisdiciton (387 U.S. at 154).[39] Thus, here, as in *Abbott Laboratories*, the district court's jurisdiction

[39] The Court in *Abbott Laboratories* stated (387 U.S. at 154):

> The Government further contends that the threat of criminal sanctions for noncompliance with a judicially untested regulation is unrealistic; the Solicitor General has represented that if court enforcement becomes necessary, "the Department of Justice will proceed only civilly for an injunction . . . or by condemnation." We cannot accept this argument as a sufficient answer to petitioners' petition. *This action at its inception was properly brought and this subsequent representation of the Department of Justice should not suffice to defeat it.* (Emphasis added).

cannot be defeated by a subsequent representation by a government lawyer that serious penalties are "unlikely." Indeed, at the time that Thunder Basin sought injunctive and declaratory relief the record in district court showed that just two months before, MSHA had actually threatened Kerr-McGee with maximum daily penalties on the identical statutory interpretation issue, and the preliminary injunction hearing established that MSHA was prepared to do the same against Thunder Basin (J.A. 47-48).

2. *Thunder Basin Is Not Required To Exhaust Its Administrative Remedies Before Initiating Suit.*

The Government has suggested that "even if there were jurisdiction in the district court, there would be no basis for excusing petitioner's failure to exhaust its administrative remedies" (Opposition to Petition for Writ of Certiorari at p. 17 n.11). The Government's argument is misplaced.

First, this Court has consistently found exhaustion unnecessary for jurisdiction to hear collateral challenges to agency action on constitutional grounds, absent clear and convincing evidence that Congress intended to preclude the action. *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991); *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Court has noted: "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

Second, the Government is confusing "exhaustion" with enforcement proceedings. Once the Court has determined that the pre-enforcement review sought here is not barred by the Mine Act and that the matter is ripe for review under *Abbott Laboratories*, the question of further exhaustion of administrative remedies is already answered: the particular agency action under judicial review is already "final" for purposes of judicial review and is not subject to further administrative revision prior to enforcement. MSHA's UMWA Designation is final and ripe for review by the courts under *Abbott Laboratories*.

Third, this case falls into the well-established exceptions to the exhaustion doctrine. *See Coit Indep. Joint Venture v. Federal Sav. & Loan*, 489 U.S. 561, 585 (1989); *Reiter v. Cooper*, —— U.S. ——, 122 L.Ed.2d 604 (1993); *McCarthy v. Madigan*, —— U.S. ——, 117 L.Ed.2d 291 (1992). Exhaustion is not required here for additional and overlapping reasons: the challenge here is to the adequacy of the agency process itself, *Barry v. Barchi*, 443 U.S. 55, 63 n.10 (1979); and Thunder Basin will suffer irreparable harm if unable to secure immediate judicial review, *Bowen v. City of New York*, 476 U.S. 647 (1986). Moreover, the questions for which agency expertise is appropriate do not arise here: the questions are purely matters of law and statutory construction which will not benefit from the development of an administrative record, *McKart v. United States*, 395 U.S. 185 (1969). Finally, resort to the administrative process would be a futile act because at the time Thunder Basin sought judicial review, MSHA and the Review Commission had already disavowed any interest in harmonizing the principles of the Mine Act and the NLRA in enforcing MSHA's designation of the UMWA and its paid organizers as miners' representatives.[40] Thus, even if an "exhaustion" requirement were superimposed on *Abbott Laboratories*, Thunder

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[40] In its rejection of Thunder Basin's protest letter, MSHA informed Thunder Basin of its position on that matter (J.A. 49). The Review Commission likewise had already held by that time that it was not required to integrate the NLRA's concepts of collective bargaining representation into regulations implementing the Mine Act. *UMWA on behalf of James Rowe v. Peabody Coal Co.*, 7 FMSHRC 1357, 1364-65 (1985), *aff'd*, 822 F.2d 1134 (D.C. Cir. 1987). Any remaining questions about the Review Commission's approach were settled in *Kerr-McGee Coal Corp.*, 15 FMSHRC ——, 1993 OSHD (CCH) ¶ 30,013 (1993), appeal pending, Case No. 93-1250 (D.C. Cir.), where the Review Commission held that the NLRA is not relevant to the determination of the designation of miners' representatives.

Basin would not be barred from immediate judicial review by the exhaustion doctrine.

IV. THE COURT OF APPEALS' DECISION SHOULD BE REVERSED AND THE CASE REMANDED.

The court of appeals' conclusion that the district court lacked jurisdiction over Thunder Basin's complaint is based upon four fundamental errors in its analysis.

First, the court of appeals totally ignored pertinent authority from this Court establishing district court jurisdiction over statutory conflict and constitutional challenges in a pre-enforcement context. The Court of Appeals never cited *Abbott Laboratories, Traynor, Leedom, Oestereich,* or *Mathews,* and gave only a passing reference to *Toilet Goods Association.* The absence of reference to the pertinent authority by the court of appeals indicates that the court failed to recognize the circumstances under which this Court has previously permitted direct district court challenge to pre-enforcement administrative action.[41]

Second, the court of appeals misread the language and legislative history of the Mine Act and misconstrued congressional intent. The court of appeals fell into the same error as did the court of appeals in *Abbott Laboratories* in relying heavily on the congressionally-specified route for review of certain administrative decisions (Pet. App.

[41] The omitted precedent answers many of the objections to pre-enforcement review raised by the court of appeals. For example, *Abbott Laboratories* dealt directly with the court of appeals' concern that pre-enforcement review could hamper the effective enforcement of the Mine Act. The effective enforcement of the Food, Drug & Cosmetic Act is certainly of equal importance of the public welfare, but the Court had no difficulty in declaring that the regulatory work of the agency will continue. The Court noted (387 U.S. at 156):

> If the agency believes that a suit of this type will significantly impede enforcement or harm the public interest, it need not postpone enforcement of the regulation and may oppose any motion for a judicial stay on the part of those challenging the regulation.

7, 9-10) while failing to recognize that other routes, including pre-enforcement review over certain claims, were still possible. *Abbott Laboratories,* 387 U.S. at 139, 141. The court of appeals also erred in its reading of the legislative history, finding support in a change concerning penalty enforcement procedures even though the legislative history showed that change had nothing to do with any intention to preclude pre-enforcement challenges (see p. 23, n.22, *supra*). Moreover, the court of appeals overlooked the most important aspect of the legislative history of the Mine Act as it relates to the pre-enforcement judicial review at issue here: Congress was clearly aware of and did not overturn the decision in *Bituminous Coal Operators Ass'n v. Secretary of Interior,* 547 F.2d 240 (4th Cir. 1977), which approved pre-enforcement review in the district courts under the Coal Act. By incorporating the Coal Act enforcement scheme into the Mine Act without language reversing *Bituminous Coal,* Congress indicated support for pre-enforcement review in appropriate circumstances under the *Abbott Laboratories* formulation.[42]

Third, the court of appeals erred in concluding that the Mine Act's review procedures are adequate to protect Thunder Basin's due process rights (Pet. App. 11-14). Although the court of appeals was troubled by MSHA's threats to Kerr-McGee (Pet. App. 13), the court never came to grips with the fundamental problem—the Mine Act scheme of penalties for continuing non-compliance during the administrative process forces parties, such as Thunder Basin and Kerr-McGee, to relinquish their important statutory rights in order to avoid large penalties.[43]

[42] The court of appeals made no mention of *Bituminous Coal* in its decision.

[43] The court of appeals' blind spot on this issue is most clearly displayed in its explanation of why it is unlikely that Thunder Basin would incur penalties in the administrative process (Pet. App. 14):

> In any event, Thunder Basin may have the merits of its claims decided without risking substantial daily penalties. After re-

Again, the court of appeals' approach cannot be squared with the settled law established by *Abbott Laboratories* that when a challenger to an administrative order must risk substantial penalties for noncompliance, that avenue of review is "inadequate as a satisfactory alternative to the present [pre-enforcement] declaratory judgment action" in district court. *Toilet Goods Ass'n*, 387 U.S. at 172.

Fourth, the court of appeals totally ignored that Congress had legislated in the NLRA that unions should not have the special advantages that MSHA is demanding here. See *Lechmere, Inc. v. NLRB*, —— U.S. ——, 112 S. Ct. 841 (1992). Contrary to the requirement imposed in *Traynor v. Turnage*, 485 U.S. 535, 547-48 (1988) and cases cited therein (see n.25 *supra*), the court of appeals made no effort to reconcile the NLRA right with Mine Act rights. As a result, the court of appeals underestimated the irreparable harm resulting from the forced acceptance of the UMWA as the miners' representative while the statutory issue is under administrative review (Pet. App. 14-16). The court of appeals concluded that it had no reason to assume that MSHA would allow the UMWA organizers to act beyond the scope of their rights outlined in the Mine Act (Pet. App. 14); but this overlooks the effect on the workplace if UMWA organizers become miners' representatives. Their presence at the mine, their participation in inspections and discussions with the miners about mine safety, their access to mine records, and the apparent alignment of government and union interests, all aid UMWA's union organizing effort by increasing the union's credibility, familiarity and accessibility with the employer, its mine and its employees. The district court found that Thunder Basin would suffer irreparable injury if it is forced to

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ceiving a citation it can abate the violation by complying, while proceeding with the appeals process.

It is evident that the court of appeals failed to recognize the importance of the statutory right and completely missed the point that Thunder Basin should not be forced by the threat of penalties to relinquish its statutory right without a hearing.

admit UMWA organizers to its facilities and that the UMWA may be seeking to gain entry to the mine to help it in its union organizing efforts (Pet. App. 28). Absent a conclusion that these findings were clearly erroneous or an abuse of discretion, and the court of appeals made no such determination, they must be credited for purposes of this jurisdictional review. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975).

For these reasons, the court of appeals' conclusion is flawed. The decision must be reversed and remanded for consideration on the merits.

CONCLUSION

Petitioner Thunder Basin respectfully prays that this Court reverse the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit, and remand the case for consideration on the merits.

Respectfully submitted,

THOMAS F. LINN
ATLANTIC RICHFIELD COMPANY
555 17th Street, 20th Floor
Denver, Colorado 80202
(303) 293-4234

CHARLES W. NEWCOM
(Counsel of Record)
J. MARK BAIRD
SHERMAN & HOWARD
3000 First Interstate Tower North
633 Seventeenth Street
Denver, Colorado 80202
(303) 297-2900

WAYNE S. BISHOP
STEWART A. BLOCK
ACKERSON & BISHOP
1275 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20004
(202) 637-0319

Counsel for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1993

THUNDER BASIN COAL COMPANY, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

DREW S. DAYS, III
Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

EDWIN S. KNEEDLER
Acting Deputy Solicitor General

ALLEN H. FELDMAN
Associate Solicitor

WILLIAM K. KELLEY
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

NATHANIEL I. SPILLER
Counsel for Appellate Litigation

DEBORAH GREENFIELD
Attorney
Department of Labor
Washington, D.C. 20210

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the district court lacked authority to entertain petitioner's challenge to the anticipated enforcement of a regulation promulgated pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* (1988 & Supp. III 1991), in light of that Act's comprehensive procedures for administrative and judicial review, under which review of enforcement decisions lies in the courts of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	12
Argument:	
The district court was without authority to adjudicate petitioner's objections to the designation of miners' representatives	15
I. The Mine Safety Act precluded the district court from exercising jurisdiction over petitioner's claims	16
A. The Act's comprehensive scheme channels judicial review of petitioner's claims exclusively to the court of appeals, after completion of the administrative process	16
B. Nothing about the nature of petitioner's claims justifies the exercise of general federal question jurisdiction by the district court	28
II. Even if the district court was not foreclosed from exercising jurisdiction, it nevertheless was required to dismiss the complaint	41
A. Petitioner has no cause of action	41
B. Petitioner's claims are not ripe for judicial review	43
C. Administrative procedures have not been exhausted	46
Conclusion	48
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967) 25, 26, 27, 43, 44, 45
Aetna Life Ins. Co. v. *Haworth*, 300 U.S. 227 (1937) 41
American Coal Co. v. *United States Dep't of Labor*, 639 F.2d 659 (10th Cir. 1981) 8
Anaconda Co. v. *Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973) 17
Association of Data Processing Service Orgs., Inc. v. *Camp*, 397 U.S. 150 (1970) 19
Barry v. *Barchi*, 443 U.S. 55 (1979) 47
Beaver Creek Coal Co. v. *Secretary of Labor*, 11 F.M.S.H.R.C. 2428 (1989) 35
Bituminous Coal Operators' Ass'n v. *Marshall*, 82 F.R.D. 350 (D.D.C. 1979) 18
Bituminous Coal Operators' Ass'n v. *Secretary of Interior*, 547 F.2d 240 (4th Cir. 1977) 23, 24
Block v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) 9, 16, 19, 20, 24, 25
Board of Governors v. *MCorp Financial, Inc.*, 112 S. Ct. 459 (1991) 16, 18, 24, 25, 28, 40
Bowen v. *City of New York*, 476 U.S. 467 (1986) 47
Bowen v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986) 24-25
Brock v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986) 47
Califano v. *Sanders*, 430 U.S. 99 (1977) 35
Carey v. *O'Donnell*, 506 F.2d 107 (D.C. Cir. 1974), cert. denied, 419 U.S. 1110 (1975) 33
CETA Workers' Org. Comm. v. *City of New York*, 617 F.2d 926 (2d Cir. 1980) 17, 20
City of Rochester v. *Bond*, 603 F.2d 927 (D.C. Cir. 1979) 32, 33
City of Tacoma v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958) 16
Climax Molybdenum Co. v. *Secretary of Labor*, 2 F.M.S.H.R.C. 2748 (1980), aff'd, 703 F.2d 447 (10th Cir. 1983) 35

Cases—Continued: Page

Coal Employment Project v. *Dole*, 889 F.2d 1127 (D.C. Cir. 1989) 18
Coit Independence Joint Venture v. *Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561 (1989) 48
Connors v. *Amax Coal Co.*, 858 F.2d 1226 (7th Cir. 1988) 32, 33
Council of S. Mountains, Inc. v. *Donovan*, 516 F. Supp. 955 (D.D.C. 1981) 18
Council of S. Mountains, Inc. v. *Martin County Coal Corp.*, 6 F.M.S.H.R.C. 206 (1984), aff'd, 751 F.2d 1418 (D.C. Cir. 1985) 39
Cyprus Empire Corp. v. *Secretary of Labor*, 15 F.M.S.H.R.C. 10 (1993) 29
Darby v. *Cisneros*, No. 91-2045 (June 21, 1993) 42
Denberg v. *United States R.R. Retirement Bd.*, 696 F.2d 1193 (7th Cir. 1983), cert. denied, 466 U.S. 926 (1984) 17, 20
Donovan v. *Dewey*, 452 U.S. 594 (1981) 38
Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) 40
Emery Mining Corp. v. *Secretary of Labor*, 10 F.M.S.H.R.C. 276 (1988), aff'd in part and rev'd in part *sub nom. Utah Power & Light Co.* v. *Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990) 29, 30
Ewing v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) 27
FCC v. *ITT World Communications, Inc.*, 466 U.S. 463 (1984) 21, 40
FTC v. *Claire Furnace Co.*, 274 U.S. 160 (1927) 21
FTC v. *Standard Oil Co.*, 449 U.S. 232 (1980) 39, 43
Franklin v. *Massachusetts*, 112 S. Ct. 2767 (1992) 43
Gardner v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967) 26, 45
Gaunce v. *deVincentis*, 708 F.2d 1290 (7th Cir.), cert. denied, 464 U.S. 978 (1983) 17
Hagans v. *Lavine*, 415 U.S. 528 (1974) 40
Heckler v. *Ringer*, 466 U.S. 602 (1984) 21, 40, 46

Cases—Continued: Page

Jim Walter Resources, Inc. v. *Federal Mine Safety & Health Review Comm'n*, 920 F.2d 738 (11th Cir. 1990) 40
Johnson v. *Robison*, 415 U.S. 361 (1974) 35
Kaiser Coal Corp. v. *Secretary of Labor*, 10 F.M.S.H.R.C. 1165 (1988) 34
Keene Corp. v. *United States*, 113 S. Ct. 2035 (1993) 23, 24
Kerr-McGee Coal Corp. v. *Secretary of Labor*, 15 F.M.S.H.R.C. 352 (1993), petition for review pending, No. 93-1250 (D.C. Cir. filed Apr. 1, 1993) 29, 30, 31, 32, 39, 47
Lechmere, Inc. v. *NLRB*, 112 S. Ct. 841 (1992) 31, 36
Leedom v. *Kyne*, 358 U.S. 184 (1958) 25, 27, 28
Local 1976, United Bhd. of Carpenters v. *NLRB*, 357 U.S. 93 (1958) 32
Lorillard v. *Pons*, 434 U.S. 575 (1978) 23
Lujan v. *National Wildlife Federation*, 497 U.S. 871 (1990) 42
Mackey v. *Montrym*, 443 U.S. 1 (1979) 39
Martin v. *Thunder Basin Coal Co.*, No. 92-8030 (10th Cir. July 20, 1992) 11
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 25, 36, 39, 40, 47
McKart v. *United States*, 395 U.S. 185 (1969) 46
McNary v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) 12, 25
Mitchell v. *W.T. Grant Co.*, 416 U.S. 600 (1974) 39
Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951) 41
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) 16, 20, 21, 33, 46
NLRB v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) 31
Oestereich v. *Selective Service System*, 393 U.S. 233 (1968) 25, 27, 28
Pacific Power & Light Co. v. *Bonneville Power Admin.*, 795 F.2d 810 (9th Cir. 1986) 20
Phillips v. *Commissioner*, 283 U.S. 589 (1931) 39

Cases—Continued: Page

Port of Boston Marine Terminal Ass'n v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970) 21
Public Service Comm'n v. *Wycoff Co.*, 344 U.S. 237 (1952) 41
Reiter v. *Cooper*, 113 S. Ct. 1213 (1993) 47
Reno v. *Catholic Social Services, Inc.*, No. 91-1826 (June 18, 1993) 27, 43, 45
Sale v. *Haitian Centers Council, Inc.*, No. 92-528 (June 28, 1993) 11
Secretary of Labor v. *Alabama By-Products Corp.*, 4 F.M.S.H.R.C. 2128 (1982) 34
Secretary of Labor v. *Jim Walter Resources, Inc.*, 9 F.M.S.H.R.C. 1305 (1987), aff'd, 920 F.2d 738 (11th Cir. 1990) 34
Secretary of Labor v. *Mid-Continent Resources, Inc.*, 12 F.M.S.H.R.C. 949 (1990) 29, 35
Secretary of Labor v. *Richardson*, 3 F.M.S.H.R.C. 8 (1981), aff'd, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983) 34
Sellersburg Stone Co. v. *Federal Mine Safety & Health Review Comm'n*, 736 F.2d 1147 (7th Cir. 1984) 37
Skelly Oil Co. v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950) 41
Southern Ohio Coal Co. v. *Donovan*, 774 F.2d 693 (1985), amended, 781 F.2d 57 (6th Cir. 1986) 36
Southern Pines Assocs. v. *United States*, 912 F.2d 713 (4th Cir. 1990) 17
Southern S.S. Co. v. *NLRB*, 316 U.S. 31 (1942) 32
Switchmen's Union v. *National Mediation Board*, 320 U.S. 297 (1943) 28
Telecommunications Research & Action Center v. *FCC*, 750 F.2d 70 (D.C. Cir. 1984) 21, 33, 39
Thunder Basin Coal Co. v. *Martin*, No. 91-CV-0050-B (D. Wyo. Mar. 13, 1992) 11
Toilet Goods Ass'n v. *Gardner*, 387 U.S. 158 (1967) 46
Traynor v. *Turnage*, 485 U.S. 535 (1988) 24, 25, 33
Truex v. *Consolidation Coal Co.*, 8 F.M.S.H.R.C. 1293 (1986) 29

Cases—Continued: Page

United Mine Workers v. *Secretary of Labor*, 5 F.M.S.H.R.C. 807 (1983), aff'd, 725 F.2d 126 (D.C. Cir. 1984) 39-40
United Mine Workers v. *Secretary of Labor*, 5 F.M.S.H.R.C. 1519 (1983) 40
United States v. *Erika, Inc.*, 456 U.S. 201 (1982) .. 20
United States v. *Fausto*, 484 U.S. 439 (1988) 19, 20, 24
United States v. *Powell*, 379 U.S. 48 (1964) 24
United States Steel Corp. v. *Marshall*, 471 F. Supp. 438 (W.D. Pa. 1979) 18
Utah Power & Light Co. v. *Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990) 6, 32
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 35, 46
Whitney Nat'l Bank v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965) 16, 18, 19, 21, 46
Zeigler Coal Co. v. *Marshall*, 502 F. Supp. 1326 (S.D. Ill. 1980) 18

Constitution, statutes and regulations:

U.S. Const. Art. III 11
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 15
§ 10(a), 5 U.S.C. 702 42
§ 10(b), 5 U.S.C. 703 .....13, 18, 42
§ 10(c), 5 U.S.C. 704 .....13, 25, 42
Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* 19
Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (formerly codified at 42 U.S.C. 1857 *et seq.*) 17
Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*..... 17
Comprehensive Employment and Training Act Amendments of 1978, Pub. L. No. 95-524, 92 Stat. 1909 (repealed 1982) 17
Declaratory Judgment Act, 28 U.S.C. 2201-2202.... 41
28 U.S.C. 2201(a) 41
Federal Aviation Act of 1958, 49 U.S.C. App. 1301 *et seq.* 17

Statutes and regulations—Continued: Page

Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (30 U.S.C. 801 *et seq.* (1976)) 22
§ 109(a)(4), 83 Stat. 756 (30 U.S.C. 819 (a)(4) (1976)) 22
Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.* 25
21 U.S.C. 371(f)(6) 26
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* (1988 & Supp. III 1991) 2, 1a
30 U.S.C. 801(g) 2, 2a
30 U.S.C. 811 21
30 U.S.C. 811(a) 2
30 U.S.C. 811(d) 2
30 U.S.C. 813(a) 2, 2a
30 U.S.C. 813(c) 3
30 U.S.C. 813(f) 2, 3, 6, 18, 29, 30, 36, 5a
30 U.S.C. 814(a) 3, 17, 18, 8a
30 U.S.C. 815(a) 4, 17, 37, 43, 12a
30 U.S.C. 815(b) 34, 12a
30 U.S.C. 815(b)(1)(A) 37, 12a
30 U.S.C. 815(b)(1)(B) 37, 12a
30 U.S.C. 815(b)(2) 38, 14a
30 U.S.C. 815(d) 4, 10, 17, 37, 18a
30 U.S.C. 816 37
30 U.S.C. 816(a)(1) 5, 17, 19a
30 U.S.C. 816(a)(3) 39, 21a
30 U.S.C. 818 .....9, 20, 23a
30 U.S.C. 818(a) 20, 23a
30 U.S.C. 820 (1988 & Supp. III 1991) 9, 27a
30 U.S.C. 820(a) (Supp. III 1991) 4, 17, 27a
30 U.S.C. 820(b) (Supp. III 1991) 4, 37, 27a
30 U.S.C. 820(i) 5, 37, 29a
30 U.S.C. 820(j) 20, 37, 29a
30 U.S.C. 823 ..... 4, 30a
30 U.S.C. 823(d)(1) 4, 5, 17, 32a
30 U.S.C. 823(d)(2)(A)(i) 4, 17, 37, 33a
30 U.S.C. 823(d)(2)(A)(ii) 5, 33a

Statutes and regulations—Continued: Page

30 U.S.C. 823(d)(2)(B) 4, 34a
30 U.S.C. 841(a) 21
30 U.S.C. 841-846 2
30 U.S.C. 861(a) 21-22
30 U.S.C. 861-878 2
30 U.S.C. 960 21
National Labor Relations Act, 29 U.S.C. 151-169 5
Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, Tit. III, § 3102, 104 Stat. 1388-29 4
Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.* 17
28 U.S.C. 1331 ..... 13, 41
29 U.S.C. 557a 2
29 C.F.R. 2700.52 ..... 10, 39
30 C.F.R.:
Pt. 40 ..... 3, 6, 8, 15, 21, 43
Section 40.1(b)(1) 3, 42
Section 40.2 3
Section 40.3 3
Section 40.4 ..... 3, 30, 38

Miscellaneous:

123 Cong. Rec. 19,927 (1977) 23
43 Fed. Reg. 29,509 (1978) 3
S. Rep. No. 181, 95th Cong., 1st Sess. (1977) 10, 22, 23, 47

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-896

THUNDER BASIN COAL COMPANY, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 969 F.2d 970. The orders of the district court (Pet. App. 19-30) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1992. A petition for rehearing was denied on August 28, 1992. Pet. App. 17-18. The petition for a writ of certiorari was filed on November 24, 1992, and was granted on March 8, 1993. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* (1988 & Supp. III 1991), are reproduced in the Appendix, *infra*.

STATEMENT

1. a. Congress enacted the Federal Mine Safety and Health Act of 1977 (Mine Safety Act), 30 U.S.C. 801 *et seq.* (1988 & Supp. III 1991), to "protect the health and safety of the Nation's coal [and] other miners." 30 U.S.C. 801(g). The Secretary of Labor is charged with enforcing the Act through the Mine Safety and Health Administration (MSHA), an entity established by Congress within the Department of Labor. 29 U.S.C. 557a.

When enacted in 1977, the Mine Safety Act carried forward on an interim basis various health and safety standards that had been adopted under prior law. See 30 U.S.C. 841-846, 861-878. The Act also authorized the Secretary to promulgate, by rule, "improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines." 30 U.S.C. 811(a). Any person who may be aggrieved by a mandatory health or safety standard promulgated by the Secretary under that authority may seek judicial review of the standard in the United States Court of Appeals for the District of Columbia Circuit or the circuit in which the person resides or has his principal place of business. 30 U.S.C. 811(d).

b. Under the Mine Safety Act's enforcement scheme, the Secretary of Labor or his representatives are authorized to conduct safety inspections of mines. 30 U.S.C. 813(a). The Act affords miners the right to have a "representative authorized by [the] miners" accompany safety inspectors, for the purpose of "aiding" inspections and "to participate in pre- or post-inspection conferences held at the mine." 30 U.S.C. 813(f). The Act also requires operators to provide miners' representatives with

access to records concerning employee exposure to "potentially toxic materials or harmful physical agents" that are subject to statutory health or safety standards. 30 U.S.C. 813(c).[1]

Pursuant to rulemaking power conferred by 30 U.S.C. 813(f), MSHA promulgated regulations in 1978 governing the selection of miners' representatives. See 30 C.F.R. Pt. 40, as adopted in 43 Fed. Reg. 29,509 (1978). Those regulations define a "representative of miners" as "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act." 30 C.F.R. 40.1(b)(1). A representative must file certain information with MSHA concerning his or her identity and designation, and must provide a copy of that information to the mine operator. 30 C.F.R. 40.2, 40.3. The operator must, in turn, post that information at the mine. 30 C.F.R. 40.4.

c. If the Secretary determines that there has been a violation of the Act or implementing health and safety standards, rules, or orders, the Act requires the Secretary to issue a citation to the mine operator. The citation must specify a reasonable time for abatement of the violation. 30 U.S.C. 814(a). The Secretary must also propose the assessment of a civil penalty of up to $50,000

[1] The court of appeals described the functions of representatives as follows (Pet. App. 3):

> A miner representative has the right to accompany the MSHA inspector on such inspections and the right to obtain an immediate inspection of the mine by MSHA if the representative has "reasonable grounds to believe that a violation of [the Mine Act] or a mandatory health or safety standard exists, or an imminent danger exists." [30 U.S.C.] 813(g)(1). The miner representative also enjoys other rights under the Mine Act. *See* [30 U.S.C.] 819(b) (representative receives "copy of any order, citation, notice, or decision required by [the Mine Act]"); [30 U.S.C.] 815(d), 817(e) (may contest issuance, modification, or termination of an order); [30 U.S.C.] 813(f) (representative may participate in pre- or post-inspection conferences).

for the cited violation. See 30 U.S.C. 815(a), 820(a) (Supp. III 1991). An operator that receives a citation but fails to correct the violation within the specified abatement period may be assessed additional civil penalties of up to $5,000 for each day the violation remains uncorrected. 30 U.S.C. 820(b) (Supp. III 1991).[2]

A mine operator may seek review of a citation or proposed assessment of a civil penalty by the Federal Mine Safety and Health Review Commission, an adjudicatory agency independent of the Department of Labor. See 30 U.S.C. 815(d), 823. The operator must notify the Secretary within 30 days of receipt of the citation or proposed penalty whether it wishes to seek such review. If it fails to do so, the Secretary's notification of the citation or proposed assessment of penalty "shall be deemed a final order of the Commission," and it is "not subject to review by any court or agency." 30 U.S.C. 815(a).

If the operator elects to seek review by the Commission, the first level of review is in the form of a hearing before an administrative law judge (ALJ). The ALJ "shall make a decision which constitutes his final disposition of the proceedings." 30 U.S.C. 823(d)(1). Thereafter, any party "adversely affected or aggrieved" by the ALJ's decision may seek discretionary review by the Commission. 30 U.S.C. 823(d)(2)(A)(i).[3] Commission review may be sought on the ground that the ALJ's factual findings are not supported by substantial evidence, that the decision is contrary to law or regulations, that a prejudicial error of procedure was committed, or that a

[2] In Section 102 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, Tit. III, 104 Stat. 1388-29, the maximum penalty under 30 U.S.C. 820(a) was increased from $10,000 to $50,000, and the maximum daily penalty under 30 U.S.C. 820(b) for a failure to abate was increased from $1,000 to $5,000.

[3] The Commission may also grant review of an ALJ decision on its own motion. 30 U.S.C. 823(d)(1), 823(d)(2)(B).

"substantial question of law, policy or discretion is involved." 30 U.S.C. 823(d)(2)(A)(ii). If the Commission does not grant review within 30 days of the ALJ's decision, that decision "shall become the final decision of the Commission." 30 U.S.C. 823(d)(1).[4]

Any person "adversely affected or aggrieved" by an order of the Commission "may obtain * * * review * * * in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit." 30 U.S.C. 816(a)(1). A petition for review must be filed within 30 days following issuance of the order. *Ibid.* The court of appeals has the power to affirm, modify, or set aside the Commission's order, in whole or in part, and to enforce the order to the extent it is affirmed or modified. The court also may remand to the Commission for the receipt of additional evidence. *Ibid.*

2. a. Petitioner operates a coal mine near Wright, Wyoming. J.A. 8. In October 1990, some miners working at petitioner's mine designated two employees of the United Mine Workers of America (UMWA), who did not work at the mine, as their representatives for purposes of the Mine Safety Act, including exercise of their "walk-around rights"—*i.e.*, accompanying MSHA officials on inspections. J.A. 11-12, 21-23; see also J.A. 25-26, 29-30; Pet. App. 3-4. In 1987, the employees at petitioner's mine had rejected the UMWA as their collective bargaining representative under the National Labor Relations Act (NLRA), 29 U.S.C. 151-169. Pet. App. 25.

[4] In determining the amount of a civil penalty to be assessed for a violation of the Act, the Commission and its ALJs must consider the operator's history of previous violations, the appropriateness of the penalty to the size of the operator's business, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. 820(i).

On November 29, 1990, petitioner informed MSHA by letter that it had received notice from the UMWA of the designation of two UMWA employees as miners' representatives, but that it was returning that notice to MSHA because petitioner believed it was invalid in two respects. J.A. 31-33. First, petitioner relied on the fact that its employees had rejected the UMWA as their collective bargaining representative under the NLRA in the 1987 election. Petitioner pointed out that in *Utah Power & Light Co.* v. *Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990), the Tenth Circuit had rejected a mine operator's contention that miners' representatives under the Mine Safety Act must be employees at the mine in question, and had stated that if the Act's provisions for designating miners' representatives are misused, "the solution is for the operator to take action against individual instances of abuse when it discovers them." J.A. 32 (quoting 897 F.2d at 452). Expressing its belief that the UMWA was misusing the designation of miners' representatives under 30 C.F.R. Pt. 40 in this case to assist in its organizing efforts, petitioner urged MSHA to make an inquiry and ensure that any designation of non-employees under 30 C.F.R. Pt. 40 is done in a manner that does not contravene the Tenth Circuit's holding in *Utah Power & Light* before it takes any action to enforce the purported designation. J.A. 32. Second, petitioner contended that the notice contained certain "technical" deficiencies. J.A. 33.

Following intervening discussions, the district manager of MSHA responded to petitioner's concerns in a letter dated March 11, 1991. J.A. 49-50. Citing *Utah Power & Light*, the district manager stated that it was "well-established" that walk-around rights under 30 U.S.C. 813(f) "extend[] to miners' representatives who are *not* employees of the mine operator." J.A. 49. The district manager further stated that MSHA had taken the position in prior court and Commission cases that a miners' representative could not be denied access to a mine based

on the operator's "general belief" that the representative will use his access for union organizing purposes. *Ibid.* The district manager then elaborated. (J.A. 49-50):

> It is clear that the right of the miners' representative, to participate under [30 U.S.C. 813(f)], is not an uncontrolled access right to the mine property to engage in any activity that the miners' representative wants. The right is one limited to travel and participate with the MSHA inspector in the safety and health inspection of the mine. The MSHA inspector controls the inspection, and it is the inspector's responsibility to ensure that the miners' representative [*sic*] activities are limited to aiding the inspection and not to engage in other unrelated activities.

Finally, the district manager informed petitioner that MSHA had received a revised designation of representatives that corrected the technical errors petitioner had identified, and that it is the operator's responsibility "to post the information" once it is received from the miners' representative. J.A. 50. The letter did not mention the possibility of a citation or civil penalty assessment for failure to post the notice.

b. On March 11, 1991, before it received the letter from the MSHA district manager, petitioner filed this suit for injunctive and declaratory relief in the United States District Court for the District of Wyoming. J.A. 6-20. The complaint predicted that, if petitioner did not post the notice—or if petitioner posted the notice but later refused to honor it (by not allowing a UMWA representative to accompany a MSHA inspector)—"MSHA will require [petitioner] to immediately comply with MSHA's interpretation." J.A. 13. That action, the complaint continued, would force petitioner either to accept a citation and risk incurring penalties for failure to comply with the Mine Safety Act, or to acquiesce in MSHA's position that UMWA employees can represent petitioner's employees for Mine Safety Act purposes (notwithstanding the 1987 election under the NLRA), thereby

"waiving" petitioner's rights under the NLRA. J.A. 13-14, 15. Petitioner alleged that to force it to choose between those options, without a prior hearing on the asserted conflict between the Mine Safety Act and the NLRA, would violate petitioner's due process rights. J.A. 16.

3. On March 21, 1991, the district court entered a preliminary injunction barring respondents from enforcing 30 C.F.R. Pt. 40 against petitioner until further order of the court. Pet. App. 24-30. Purporting to apply traditional criteria governing issuance of a preliminary injunction, the court noted that petitioner "[did] not claim it will succeed on the merits," but rather had "rais[ed] serious questions going to the merits" because of what the court termed the "difficult question" of how petitioner is to act given the purported "conflict between the [NLRA] and the regulations promulgated under [the Mine Safety Act.]." *Id.* at 27. The court also concluded that petitioner would suffer irreparable harm because of "potential abuse" of the Act's representation provisions by UMWA employees and petitioner's exposure to penalties if it failed to comply with the regulations. *Id.* at 28.

Subsequently, the district court denied respondents' motion to dismiss for lack of subject matter jurisdiction and failure to exhaust administrative remedies. Pet. App. 19-23. The court sought to distinguish the Tenth Circuit's decision in *American Coal Co.* v. *United States Dep't of Labor*, 639 F.2d 659 (1981), which held that district courts lack jurisdiction to resolve disputes under the Mine Safety Act, on the ground that *American Coal* "only involved a violation or interpretation of a [Mine Safety Act] regulation," whereas this case raised a "statutory conflict, and the allegation of a constitutional violation." Pet. App. 20-21. The district court also held that petitioner did not have to exhaust its administrative remedies under the Mine Safety Act, because the Commission does not have the expertise to resolve a conflict between

the Mine Safety Act and the NLRA and because petitioner contended that resolution of that conflict through standard MSHA procedures would violate petitioner's due process rights. *Id.* at 21, 22.

4. The court of appeals vacated the preliminary injunction and remanded with instructions to dismiss the action for lack of jurisdiction. Pet. App. 1-16. The court reasoned that "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Id.* at 5 (quoting *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984)). After analyzing those factors with respect to the Mine Safety Act, the court adhered to its holding in *American Coal* that the Act's preclusion of district court review can be fairly discerned from the comprehensiveness of the procedures established by the Act and the limited retention of district court jurisdiction over certain actions brought by the Secretary under 30 U.S.C. 818 and 820 (1988 & Supp. III 1991). Pet. App. 5-8. The court therefore held that "actions taken under the Act should be challenged initially before the administrative agency in accordance with the administrative review procedures outlined in 30 U.S.C. § 816." Pet. App. 7.

Although the court of appeals believed that it "need not go beyond the precedent of *American Coal* and the language of the Act," Pet. App. 9, it concluded that the legislative history of the Act also supports the conclusion that the district court had no authority to resolve the dispute. The court explained that under the predecessor to the Mine Safety Act, penalty assessments were subject to challenge in district court, but that Congress had changed that regime to provide for exclusive judicial review in the courts of appeals. Congress did that in order to permit more timely correction of safety and

health hazards and to induce compliance with the law by mine operators. Pet. App. 9-10 (citing S. Rep. No. 181, 95th Cong., 1st Sess. 8 (1977)); Pet. App. 10 & n.4 (citing S. Rep. No. 181, *supra*, at 16, 40).

The court of appeals next concluded that nothing about the nature of petitioner's claims required an exception to that procedure here. It noted that "the Mine Act * * * does not limit the bases upon which a party may challenge a citation, order or proposed assessment," and does not "distinguish between challenges to orders based on constitutional grounds or conflict with other statutes and challenges based on misapplication of the Act itself." Pet. App. 8. In fact, the court pointed out, the Commission is able to, and routinely does, consider constitutional issues. *Id.* at 8-9. In any event, the court held, the availability of review in the court of appeals is "adequate to address both constitutional challenges and questions of conflict with other statutes." *Id.* at 9.

Finally, the court of appeals held that the statutory review procedures sufficiently protect petitioner's interests. Pet. App. 11-15. Because the Act does not require a party to pay any penalties until the administrative and judicial review process is complete, the court concluded that the Act provides "a full and adequate hearing" to a party who receives a citation. *Id.* at 12. The court also observed that petitioner could avoid significant penalties either by abating the violation while challenging the citation or by requesting an expedited hearing if it chose to remain in noncompliance. *Id.* at 14; see also 30 U.S.C. 815(d); 29 C.F.R. 2700.52. The court rejected petitioner's contention that it would be irreparably harmed if it were required to permit the UMWA employees to act as miners' representatives pending the outcome of the administrative process. It found no reason to believe that MSHA would permit representatives to act beyond the scope of their duties under the Mine Safety Act, and

concluded that the Act's procedures are adequate to challenge such conduct if it occurs. Pet. App. 14-16.[5]

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[5] While respondents' appeal of the preliminary injunction was pending, the district court held a trial on the merits. The court concluded, without addressing petitioner's due process claim, that it was unreasonable and would conflict with the NLRA for the Secretary to permit miners to designate union personnel as representatives under the Mine Safety Act. See *Thunder Basin Coal Co.* v. *Martin*, No. 91-CV-0050-B (D. Wyo. Mar. 13, 1992). The court accordingly entered a permanent injunction barring the Secretary from enforcing his regulations in a manner that would require petitioner to admit union personnel to its mine.

Respondents appealed the permanent injunction. *Martin* v. *Thunder Basin Coal Co.*, No. 92-8030 (10th Cir. July 20, 1992). Petitioner sought to stay the court's determination of the appeal of the preliminary injunction and to consolidate it with respondents' appeal of the permanent injunction. In its decision reversing the preliminary injunction, the court of appeals denied the motion for a stay and consolidation, on the ground that the parties had had ample opportunity to argue the dispositive jurisdictional issue. Pet. App. 7 n.3. On the same day, the court of appeals issued an order to show cause why respondents' appeal of the permanent injunction should not be dismissed for want of jurisdiction, in light of its decision, at issue here, ordering dimissal of the case. The court subsequently dismissed the appeal in No. 92-8030, but stayed its mandate on that appeal pending the filing and disposition of a petition for a writ of certiorari in this case.

Neither party has argued that the district court's entry of the permanent injunction rendered the preliminary injunction moot, such that the court of appeals could not dispose of the jurisdictional issue and order dismissal of the case on respondents' appeal of the preliminary injunction. Compare *Sale* v. *Haitian Centers Council, Inc.*, No. 92-528 (June 28, 1993) (vacating as moot court of appeals' decision affirming preliminary injunction in light of the subsequent entry of a permanent injunction). The court of appeals in this case had both appeals pending before it. Because the overall case is not moot, the court of appeals' decision to address a jurisdictional issue common to both appeals in the context of one appeal rather than the other presents no Article III mootness concern.

SUMMARY OF ARGUMENT

I. The Mine Safety Act's text, structure, and legislative history evince a clear congressional intent to channel judicial review to the courts of appeals and away from the district courts. The Act's procedures for administrative and judicial review are comprehensive. They place no limits on either the Commission's or the courts of appeals' authority to review a citation or penalty. At the same time, the Act grants the district courts jurisdiction in two limited circumstances, and only in suits by the Secretary. In light of these carefully drawn provisions, the procedures for mine operators to obtain judicial review of enforcement disputes in the courts of appeals are exclusive. The legislative history reinforces that conclusion, because it manifests a purpose to centralize consideration of enforcement matters in the Commission before they are brought to the courts, and to oust the district courts of jurisdiction they had under the predecessor statute.

Petitioner relies on decisions of this Court permitting district court review under other statutes because the evidence of congressional intent to preclude such review was insufficient. Those cases are inapposite, however, because they involved the question whether "Congress intended to foreclose all forms of meaningful judicial review" of the agency action. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991). Here, Congress has provided for judicial review in the courts of appeals, and that review is meaningful and adequate.

Nothing about the nature of petitioner's claim supports circumvention of the Commission followed by direct review in a court of appeals. At bottom, petitioner presents a routine dispute over the scope of the Mine Safety Act, when read in light of the National Labor Relations Act. The Commission has the power and expertise to resolve that dispute, and it resolved the precise issue in a case involving another mine operator. The Commission also

considers constitutional issues in enforcement proceedings. After the Commission's proceedings are complete, petitioner may then seek judicial review of its decision on both statutory and constitutional grounds.

Petitioner errs in arguing that the Mine Safety Act's review procedures violate due process by putting it to an impermissible choice between forfeiting its "right" under the NLRA to exclude union employees and complying with a citation for failure to post the designation of miners' representatives at its mine. Petitioner is entitled to stand on its asserted "right" under the NLRA to exclude union employees while administrative proceedings are pending, rather than comply with a citation (should one be issued). Moreover, MSHA only proposes penalties; it is the Commission that actually assesses them. And a mine operator is not required to pay penalties until judicial review is completed. Thus, petitioner would experience no pre-hearing "deprivation" if MSHA issued a citation or proposed a penalty; and, in any event, any such deprivation could be fully remedied by the Commission or a court of appeals in reviewing a penalty.

II. Even if district court jurisdiction is not barred, dismissal of the complaint was proper on other grounds.

A. Although petitioner invoked 28 U.S.C. 1331 as a basis for jurisdiction in the district court, that statute does not create any cause of action. Petitioner must look elsewhere for a cause of action against the government. The Administrative Procedure Act (APA) provides a cause of action for persons aggrieved by agency action, but it limits that cause of action to the relevant statutory review procedure unless that procedure is inadequate. 5 U.S.C. 703. Because the Mine Safety Act's review procedure is plainly adequate, the APA does not permit petitioner to sue in district court. Moreover, the APA provides for judicial review only of "final agency action." 5 U.S.C. 704. In this case, petitioner does not challenge the issuance of regulations (which presumably would constitute final

agency action), but rather challenges a particular interpretation of regulations communicated to it by a MSHA official. Neither the Secretary nor the Commission has taken any enforcement action whatever (much less final agency action) against petitioner on the basis of that interpretation.

B. Even if there were "final agency action," the controversy is not ripe. First, the issues are not presently fit for judicial review, because development of a factual record before the Commission in a particular application of the regulations would shed light on the nature of inspections and the role of miners' representatives under the Act. Second, petitioner would not experience substantial hardship if it respected its employees' designation of representatives pending Commission review.

C. Dismissal also was proper under principles governing exhaustion of administrative remedies. The Mine Safety Act requires any person wishing to contest a citation or proposed penalty to seek review before the Commission. Adherence to that procedure would serve the purposes of the exhaustion doctrine by enabling the Commission to exercise its expertise and develop a factual record to facilitate judicial review.

ARGUMENT

THE DISTRICT COURT WAS WITHOUT AUTHORITY TO ADJUDICATE PETITIONER'S OBJECTIONS TO THE DESIGNATION OF MINERS' REPRESENTATIVES

The question in this case is whether the Mine Safety Act requires judicial review of petitioner's objections to its employees' designation of miners' representatives to take place in the court of appeals, after the comprehensive administrative review process has run its course, rather than in district court. Thus, contrary to the fundamental premise of petitioner's argument, this case does not involve a true question of preclusion of judicial review. The issue, rather, is whether Congress has channeled review to one court rather than another. We submit that the text and structure of the Mine Safety Act, as well as this Court's cases, compel the conclusion that petitioner's claims may be brought only in the court of appeals, after the Commission has rendered a final decision in an enforcement action. Any other result would permit mine operators and others routinely to evade the comprehensive statutory procedures for administrative and judicial review simply by filing an anticipatory suit in a federal district court.

The conclusion that the district court was precluded from entertaining petitioner's suit is reinforced by the fact that there is in any event no "final agency action" that would be subject to judicial review in the district court under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* MSHA has not issued a citation or proposed a civil penalty to be assessed against petitioner based on a failure to comply with 30 C.F.R. Pt. 40; and, even if it had, neither the citation nor the proposed penalty would be final agency action subject to judicial review at that point, but rather would first have to be challenged by petitioner before the Commission. For similar reasons, the dismissal

of petitioner's suit was required because the MSHA district manager's interpretation in this setting of the regulations governing designation of miners' representatives is not ripe for judicial review in the absence of a concrete application of the regulations by MSHA and the Commission in a particular enforcement context, and because petitioner would then have to comply with established principles requiring exhaustion of administrative remedies. These three additional defects in petitioner's suit—the absence of "final agency action," the lack of a ripe controversy, and the absence of any resort to administrative remedies—would be cured if judicial review took place in the manner expressly provided for in the Act.

I. THE MINE SAFETY ACT PRECLUDED THE DISTRICT COURT FROM EXERCISING JURISDICTION OVER PETITIONER'S CLAIMS

A. The Act's Comprehensive Scheme Channels Judicial Review Of Petitioner's Claims Exclusively To The Court Of Appeals, After Completion Of The Administrative Process

1. The Mine Safety Act's text, structure, and legislative history evince a clear congressional intent to channel judicial review to the courts of appeals and away from the district courts. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984). In similar circumstances, this Court has concluded that the review scheme provided by statute is exclusive and leaves no room for any residual jurisdiction to be exercised by the district courts under more general jurisdictional provisions. *Board of Governors v. MCorp Financial, Inc.*, 112 S. Ct. 459, 464-466 (1991); *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50 (1938).[6] The same conclusion follows here.

[6] The lower courts have followed suit in the context of other statutory schemes establishing a comprehensive administrative scheme followed by judicial review in the courts of appeals. *E.g.*, *Southern Pines Assocs.* v. *United States*, 912 F.2d 713, 715 (4th Cir. 1990) (Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*); *Gaunce* v. *deVincentis*, 708 F.2d 1290, 1292 (7th Cir.) (per curiam) (Federal Aviation Act of 1958, 49 U.S.C. App. 1301 *et seq.*), cert. denied, 464 U.S. 978 (1983); *Denberg* v. *United States R.R. Retirement Bd.*, 696 F.2d 1193 (7th Cir. 1983) (Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.*), cert. denied, 466 U.S. 926 (1984); *CETA Workers' Org. Comm.* v. *City of New York*, 617 F.2d 926, 936 (2d Cir. 1980) (Comprehensive Employment and Training Act Amendments of 1978, Pub. L. No. 95-524, 92 Stat. 1909 (repealed 1982)); *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973) (Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (formerly codified at 42 U.S.C. 1857 *et seq.*)).

Congress specified in the Mine Safety Act the events that trigger a right of judicial review and the prerequisites to obtaining that review. Under the statutory scheme, the Secretary is obliged to issue a citation upon determining that a mine operator has violated the Act or a standard or regulation promulgated under it, and to set a time limit in which the operator must abate the violation. See 30 U.S.C. 814(a). If the Secretary determines that a civil penalty is warranted, he then must notify the operator of the proposed civil penalty to be assessed for the violation. See 30 U.S.C. 815(a), 820(a) (Supp. III 1991). An operator wishing to contest the Secretary's action then has 30 days within which to invoke the administrative review process. That process is entirely independent of the Department of Labor. It consists first of a hearing before an ALJ, 30 U.S.C. 815(a) and (d), 823(d)(1), followed by discretionary review by the Commission. 30 U.S.C. 823(d)(2)(A)(i). At that point, any party "adversely affected or aggrieved" by a Commission order is entitled to judicial review in the courts of appeals. 30 U.S.C. 816(a)(1).[7]

[7] Once an aggrieved party seeks judicial review in a particular court of appeals, the Act provides that the jurisdiction of that court is "exclusive." 30 U.S.C. 816(a)(1).

The Mine Safety Act places no limits on the nature or scope of the violations that are subject to this scheme. See 30 U.S.C. 814(a) (Secretary shall issue a citation for violation of "any mandatory health or safety standard, rule, order, or regulation promulgated" under the Act). Nor does the Act place any limits on an aggrieved party's right to obtain Commission review of the Secretary's determination, or judicial review in the courts of appeals. The circumstances of this case thus fall within the principle, long established in this Court's cases, that the review process established by statute for a category of controversies is exclusive and does not permit district courts to exercise jurisdiction over the same controversies. *MCorp Financial, Inc.*, 112 S. Ct. at 465-466; *Whitney Nat'l Bank*, 379 U.S. at 420; see 5 U.S.C. 703 (under the APA, "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute").[8]

Petitioner asserts (Br. 17-24) that the comprehensiveness of the statutory scheme is immaterial, because the Act does not in terms bar the district courts from exercising their general federal question jurisdiction. In petitioner's view, a preclusion of review in the district court should be found only if Congress "employs unambiguous language to that end." Pet. Br. 20. That argument finds no support in this Court's cases. Rather, the Court has held that a statutory preclusion of review—even one that altogether bars a party from obtaining judicial review of particular agency action, rather than, as here, one that merely channels judicial review to a particular forum—can be based on "inferences of intent drawn from the statutory scheme as a whole." *Block*, 467 U.S. at 349. Thus, specific language or history addressing the question of preclusion of district court jurisdiction is unnecessary, so long as "the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Id.* at 351 (quoting *Association of Data Processing Service Orgs., Inc.* v. *Camp*, 397 U.S. 150, 157 (1970)); see also *United States* v. *Fausto*, 484 U.S. 439, 452 (1988).[9] Similarly, in *Whitney Nat'l Bank*, the Court held that Congress's failure explicitly to preclude district court jurisdiction "does not require a different conclusion," because where Congress "has enacted a specific statutory scheme for obtaining review, * * * the statutory mode of review [must] be adhered to notwithstanding the absence of an express statutory command of exclusiveness." 379 U.S. at 422.

[8] A number of district courts have held that the Mine Safety Act's procedures for administrative and judicial review deny them jurisdiction to resolve disputes arising under the statute. In *Bituminous Coal Operators' Ass'n* v. *Marshall*, 82 F.R.D. 350, 352 (D.D.C. 1979) (see Pet. App. 5), the district court concluded that it had no jurisdiction over a pre-enforcement challenge to an Interpretative Bulletin issued by the Secretary that clarified miners' walk-around rights under 30 U.S.C. 813(f), because "[t]he structure of the Act * * * makes it quite clear that Congress intended that all legal challenges to the Act, to its enforcement and to any regulations promulgated thereunder be heard by the Federal Courts of Appeals, not by the Federal District Courts." See also *Council of S. Mountains, Inc.* v. *Donovan*, 516 F. Supp. 955 (D.D.C. 1981); *United States Steel Corp.* v. *Marshall*, 471 F. Supp. 438 (W.D. Pa. 1979); cf. *Coal Employment Project* v. *Dole*, 889 F.2d 1127 (D.C. Cir. 1989). But see *Zeigler Coal Co.* v. *Marshall*, 502 F. Supp. 1326 (S.D. Ill. 1980).

[9] In *Block*, the Court concluded that *no* judicial review in any forum was available to milk consumers who wished to challenge certain milk marketing orders issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* That statute established a complex administrative and judicial review process that gave a right of review to milk processors ("handlers"), without mentioning milk consumers or other parties. This Court concluded that the structure of the statute indicated a congressional intent to limit a right of judicial review to the handlers, and that to conclude otherwise "would severely disrupt th[e] complex and delicate administrative scheme." 467 U.S. at 348. The result in this case follows *a fortiori* from *Block*. Unlike the milk consumers in *Block*, petitioner concededly is entitled to judicial review at some point. The only question is where and when that review will take place.

Moreover, the premise of petitioner's argument—that the Mine Safety Act itself is silent on the question of suits brought in the district courts—is incorrect. The Act in fact specifies those situations in which district courts may consider claims arising under it. First, 30 U.S.C. 818(a) authorizes "[t]he Secretary" to "institute a civil action" in district court to enjoin a party from violating the Act or rules or standards issued under the Act, and to enforce orders of the Commission. Second, 30 U.S.C. 820(j) gives district courts jurisdiction over actions brought by the Secretary to collect civil penalties assessed under the Act. Section 818, which petitioner fails to cite, is particularly significant, because it grants only the Secretary the right to bring an action in district court concerning enforcement of the Act and implementing regulations. By contrast, nothing in the Act permits district courts to exercise jurisdiction over similar suits by mine operators or any other private party concerning enforcement of the Act; it instead specifically directs the claims of those parties to the courts of appeals, and then only after MSHA has instituted enforcement proceedings and the administrative process has run its course. "In the context of the statute's precisely drawn provisions," the omission of any provision for judicial review of enforcement matters in the district courts at the behest of private parties "provides persuasive evidence that Congress deliberately intended to foreclose * * * review of such claims." *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982); see also *Fausto*, 484 U.S. at 448; *Block*, 467 U.S. at 347-352; *Myers*, 303 U.S. at 48.[10]

Petitioner's contrary position would be fundamentally inconsistent with, and destructive of, the statutory scheme. As the events in this case demonstrate, permitting district

[10] See also *Pacific Power & Light Co.* v. *Bonneville Power Admin.*, 795 F.2d 810, 814 (9th Cir. 1986) (where statute differentiates between matters subject to district and appellate court jurisdiction, that scheme is exclusive); *Denberg*, 696 F.2d at 1195; *CETA Workers' Org. Comm.*, 617 F.2d at 935 n.9; Pet. App. 10-11.

courts to entertain suits intended to preempt the administrative enforcement scheme would threaten the very "effectiveness of the statutory design." *Whitney Nat'l Bank*, 379 U.S. at 420. Indeed, in this case, the assumption of jurisdiction by the district court cut off the statutory scheme entirely. By enjoining MSHA from enforcing 30 C.F.R. Pt. 40 against petitioner, the district court prevented issuance of a citation or assessment of a civil penalty, which in turn would have provided an occasion for petitioner to obtain review by the Commission and then the court of appeals. Under this Court's cases, petitioner "may not evade" the statutory process in that manner. *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); see also *Heckler* v. *Ringer*, 466 U.S. 602, 621-622 (1984) (Medicare claimant may not avoid statutory procedures for administrative and judicial review by filing anticipatory action for declaratory judgment in district court); *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69-70 (1970); *Whitney Nat'l Bank*, 379 U.S. at 419-422; *Myers*, 303 U.S. at 48; *FTV* v. *Claire Furnace Co.*, 274 U.S. 160, 173-174 (1927); *Telecommunications Research & Action Center* v. *FCC*, 750 F.2d 70, 78 (D.C. Cir. 1984) (*TRAC*).[11]

[11] The reliance by petitioner (Br. 20) and its amici (American Mining Cong. Br. 11-12) on 30 U.S.C. 960 is misplaced. Section 960 states that "[i]n any proceeding in which the validity of any interim mandatory health or safety standard * * * is in issue, no justice, judge, or court of the United States shall issue any temporary restraining order or preliminary injunction" restraining enforcement pending a determination on the merits. This provision says nothing about the courts in which challenges to MSHA or Commission action may be brought; it simply proscribes a particular form of temporary relief in such a case.

Moreover, the Act provides that interim standards, which are derived from standards in effect under predecessor statutes, "shall be enforced in the same manner and to the same extent" as the mandatory health and safety standards that the Secretary is authorized to promulgate under 30 U.S.C. 811. See 30 U.S.C. 841(a),

2. Petitioner relies (Br. 21-24) on the Mine Safety Act's legislative history as evincing an intent to permit district court jurisdiction over disputes arising under the Act. The legislative history, however, demonstrates just the opposite. The Act was passed to centralize consideration of all enforcement disputes arising under it in the Commission, and it *divested* the district courts of the jurisdiction over such disputes that they had previously had.

Under the Mine Safety Act's predecessor statute, the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (Coal Act) (formerly codified at 30 U.S.C. 801 *et seq.* (1976)), mine operators had the right directly to contest civil penalty assessments in district courts. See Pub. L. No. 91-173, § 109(a)(4), 83 Stat. 756 (30 U.S.C. 819(a)(4) (1976)). In those actions, the district courts reviewed "de novo all relevant issues," with only limited exceptions. *Ibid.*; see also S. Rep. No. 181, *supra*, at 45. Responding to problems of delayed enforcement under the predecessor act, Congress eliminated "[t]his lengthy, and often repetitive procedure," *id.* at 44, and substituted plenary review before the Commission in its place. *Id.* at 45-46. Congress thus explicitly divested the district courts of jurisdiction over disputes concerning application of the Act and implementing standards and regulations, and instead channeled all such disputes to a new agency that could be expected to resolve those disputes more efficiently. It would be odd for Congress to restructure the review process in that manner, and at the same time expect district courts nonetheless to entertain Mine Safety Act enforcement disputes, which are undoubtedly subject to Commis-

861(a). Thus, violations of interim standards are subject to citations, proposed penalties, and challenges through the Act's exclusive review scheme, and enforcement of those standards may not be enjoined by a district court or any other court pending exhaustion of the Act's remedies.

sion review, followed by judicial review in the courts of appeals.[12]

Petitioner's primary argument (Br. 23) from the legislative history of the Act is based on the Senate Report's passing citation of the Fourth Circuit's decision in *Bituminous Coal Operators' Ass'n* v. *Secretary of Interior*, 547 F.2d 240 (1977) (*BCOA*), in which the court concluded that the predecessor statute to the Mine Safety Act did not bar district court jurisdiction over a pre-enforcement challenge. See S. Rep. No. 181, *supra*, at 14.[13] As petitioner concedes (Br. 22-23), however, the Senate Report's citation of *BCOA* referred only to the merits of the Fourth Circuit's decision, which concerned the authority of the Secretary to enforce the Act against construction companies at a mine site. Petitioner nonetheless argues (Br. 22) that Congress ratified that decision's jurisdictional holding by failing to reject it. Petitioner relies on the principle that Congress may be held to have ratified "earlier judicial interpretations" of a statute "and, in effect, adopt[s] them" when it reenacts a statute without rejecting the prior construction. *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2043 (1993); see also *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). That proposition, however, does not support petitioner here.

[12] Petitioner and its amici claim (Pet. Br. 23 n.22; American Mining Cong. Br. 11 n.14) that Congress's elimination of *de novo* trials in district court over penalty assessments evinces no intent to preclude *pre*-enforcement challenges in that forum. That argument, however, is inconsistent with the entire scheme of the Mine Safety Act, which places authority in the Commission to entertain such disputes out of a desire to centralize and streamline the process.

[13] Petitioner also relies (Br. 23-24 n.23) on an isolated floor statement of Senator Javits to the effect that mine operators would retain their right of access to "Federal courts" to contest Mine Safety Act disputes. 123 Cong. Rec. 19,927 (1977). That statement, of course, is entirely consistent with requiring mine operators to follow the prescribed statutory procedure, which culminates with judicial review in the courts of appeals.

First, in supplanting the Coal Act (under which *BCOA* was decided) with the Mine Safety Act, Congress changed the statutory review scheme in significant ways. Most importantly, Congress divested the district courts of their jurisdiction (specifically noted by the court in *BCOA*, see 547 F.2d at 243 & n.10) to hear challenges to civil penalty determinations—and thereby to resolve questions arising under the Act and implementing regulations in the course of doing so. The Mine Safety Act also worked a dramatic change in the statutory review process in its creation of the Commission and its vesting in the Commission of jurisdiction to consider all disputes that arise under the Act. Thus, although Congress did not reject *BCOA* by name, the statutory scheme it enacted is fundamentally inconsistent with the jurisdictional arrangement contemplated by the Fourth Circuit's decision in that case.

It would in any event be inappropriate to regard the Mine Safety Act as ratifying, sub silentio, the decision in *BCOA*. This Court has recently reaffirmed (see *Keene Corp.*, 113 S. Ct. at 2043) that the principle on which petitioner relies applies only where the courts had arrived at a "settled judicial construction" of a statute prior to its amendment or reenactment. *United States* v. *Powell*, 379 U.S. 48, 55 n.13 (1964). A single court of appeals decision of dubious merit—rendered prior to this Court's decisions in *Block* v. *Community Nutrition Inst.*, *supra*, *United States* v. *Fausto*, *supra*, and *Board of Governors* v. *MCorp Financial, Inc.*, *supra*—hardly qualifies as a "settled judicial construction" that binds all federal courts, especially when Congress has fundamentally amended the statute it interpreted.

3. Seeking to paint this as a case involving preclusion of all judicial review, petitioner relies (Br. 15-16) on the "strong presumption that Congress intends judicial review of administrative action." *Traynor* v. *Turnage*, 485 U.S. 535, 542 (1988) (quoting *Bowen* v. *Michigan Academy*

of Family Physicians, 476 U.S. 667, 670 (1986)). Petitioner invokes a series of cases in which this Court concluded that the district court had jurisdiction over a controversy because the evidence of congressional intent to preclude review was insufficient. See *McNary* v. *Haitian Refugee Center, Inc.*, *supra*; *Traynor* v. *Turnage*, *supra*; *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Oestereich* v. *Selective Service System*, 393 U.S. 233 (1968); *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

In those cases, however, the question was whether "Congress intended to foreclose all forms of meaningful judicial review" of the particular agency action at issue. *McNary*, 498 U.S. at 496. The Court has been reluctant to conclude that Congress intended to do so—although it has on occasion found that to be Congress's intent, see *Block*, 467 U.S. at 345-352. The situation here is far different because Congress has plainly prescribed "a meaningful and adequate opportunity for judicial review" of petitioner's claims. *MCorp Financial, Inc.*, 112 S. Ct. at 466.

For similar reasons, petitioner's reliance (Br. 16, 17, 19) on *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), is also misplaced. In that case, the question was whether the Federal Food, Drug, and Cosmetic Act (Drug Act), 21 U.S.C. 301 *et seq.*, prohibited pre-enforcement judicial review of certain regulations promulgated under that Act, in light of the statute's grant of jurisdiction to the courts of appeals to consider pre-enforcement challenges to certain other types of regulations. See *Abbott Laboratories*, 387 U.S. at 141 & n.3. The Court pointed out that the regulations constituted "final agency action" within the meaning of the APA and that the APA provides for judicial review not only of "[a]gency action made reviewable by statute," but also of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. 704. See 387 U.S. at 140-141, 148, 149. Those provisions, the Court explained, create a presump-

tion in favor of judicial review and should be given a "hospitable" interpretation. *Id.* at 141.

After examining the Drug Act's text and legislative history, the Court concluded in *Abbott Laboratories* that the provision permitting direct review in the courts of appeals of certain sorts of regulations was not intended impliedly to preclude review of other regulations in district court. 387 U.S. at 142-144. The Court found that conclusion to be "strongly buttressed" by the Drug Act's saving clause, 21 U.S.C. 371(f)(6), which provided that the statute's specific judicial review provisions were "in addition to and not in substitution for any other remedies provided by law." See 387 U.S. at 144. On that basis, the Court concluded that the provisions for pre-enforcement judicial review in certain circumstances did not justify an inference that Congress intended thereby to supplant the general equitable jurisdiction of the district courts. *Ibid.*; accord *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 168 (1967).

This case is completely different. In the first place, petitioner does not challenge "final agency action," for which the APA creates the presumption in favor of judicial review that the Court relied upon in *Abbott Laboratories*. We may assume for present purposes that the Secretary's promulgation in 1978 of the regulations governing selection of miners' representatives was "final agency action." But petitioner does not challenge the lawfulness of those regulations, and any such challenge at this late date (especially in a *pre*-enforcement action) would confront a serious laches obstacle. Petitioner instead challenges only a particular interpretation and anticipated application of those regulations. MSHA, however, has not issued a formal citation or proposed a civil penalty against petitioner based on the disputed interpretation, and there accordingly has been no final decision by the Commission on any such action by MSHA. This suit was triggered by nothing more than communications between the MSHA district manager and petitioner, which plainly do not constitute "final agency action." See pp. 42-43, *infra*.

Second, when it enacted the Mine Safety Act, Congress did not provide a "circumscribed remedy," *Abbott Laboratories*, 387 U.S. at 141, for resolution of only certain disputes concerning enforcement of the Act and implementing regulations. The Act's procedures for administrative and judicial review are comprehensive. Significantly, in *Abbott Laboratories* itself, the Court stressed that where the special provisions of the Drug Act that provide for judicial review in a court of appeals apply, "presumably they must be used and a court would not grant injunctive or declaratory judgment relief unless the appropriate administrative procedure is exhausted." 387 U.S. at 146; compare *Reno* v. *Catholic Social Services, Inc.*, No. 91-1826 (June 18, 1993), slip op. 17. So too here, because the special statutory review procedures apply to the possible enforcement dispute petitioner foresees, a district court may not grant injunctive or declaratory relief with respect to that same dispute.[14]

Nor, contrary to petitioner's contention (Br. 12, 27), is this case at all like *Oestereich* v. *Selective Service System*, *supra*, or *Leedom* v. *Kyne*, *supra*. In those cases,

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[14] In fact, this case is very much like *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), a case distinguished in *Abbott Laboratories*. See 387 U.S. at 146-148. As the Court explained in *Abbott Laboratories*, *Ewing* held that "the owner could raise his constitutional, statutory, and factual claims in the libel actions themselves, and that the mere finding of a probable cause by the Administrator could not be challenged in a separate action." 387 U.S. at 147. Relief in a collateral action "was not specifically granted by the Act, which did provide another type of relief in the form of a consolidation of multiple libel actions in a convenient venue." *Id.* at 148. Here, too, the operator may raise its constitutional, statutory, and factual claims in the administrative and judicial enforcement proceedings themselves, and the Act specifically provides another type of judicial relief—in the court of appeals.

the agency action at issue was facially *ultra vires*, it interfered with rights conferred on the plaintiffs by the same Act under which the agency had acted, and if suits in district court were barred, there would have been no judicial review of any sort. *Oestereich*, 393 U.S. at 235-237; *Leedom*, 358 U.S. at 185. Here, whatever the merits of petitioner's claims, there can be no credible contention that the Mine Safety Act itself *prohibits* union employees from acting as miners' representatives or confers a right on mine operators to bar them from doing so. More importantly, this Court's recent decision in *MCorp Financial, Inc.*, 112 S. Ct. at 465-466 & n.16, makes clear that a district court may not assume jurisdiction under the rationale of *Leedom* and *Oestereich* if Congress has otherwise provided an avenue for administrative and judicial review of the plaintiff's claim. "If and when" the Commission concludes that petitioner has violated the Mine Safety Act and its implementing regulations, petitioner "will have, in the Court of Appeals, an unquestioned right to review of both the regulation[s] and [their] application." *MCorp Financial, Inc.*, 112 S. Ct. at 466. See also *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943).

B. Nothing About The Nature Of Petitioner's Claims Justifies The Exercise Of General Federal Question Jurisdiction By The District Court

Petitioner relies (Br. 25, 29) on the nature of its claims to justify the exercise of district court jurisdiction. There is no basis, however, for bypassing the statutory scheme established by Congress for review of disputes that arise under the Mine Safety Act, as this one plainly does. At bottom, petitioner's claim constitutes a garden variety disagreement over the proper interpretation of the Mine Safety Act—a matter that the Commission has the power and expertise to decide, subject to judicial review in the court of appeals after it has done so.

1. The underlying issue that petitioner brought to the district court was whether miners' representatives selected under 30 U.S.C. 813(f) and the Secretary's implementing regulations may include union employees in a non-union mine. Although that issue implicates the relationship of the Mine Safety Act and the NLRA, its resolution ultimately turns on the meaning of the Mine Safety Act, a subject that lies at the core of the Commission's jurisdiction and expertise.[15] Not only has the Commission had many occasions to consider the scope and application of 30 U.S.C. 813(f),[16] but it has recently decided the precise issue raised by petitioner in this case. See *Kerr-McGee Coal Corp.* v. *Secretary of Labor*, 15 F.M.S.H.R.C. 352 (1993), petition for review pending, No. 93-1250 (D.C. Cir. filed Apr. 1, 1993).[17]

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[15] Petitioner errs in arguing (Br. 27-28) that the Commission's expertise in Mine Safety Act issues is irrelevant to its ability to decide petitioner's statutory claim. Even under petitioner's view that this case presents a "conflict" between the Mine Safety Act and the NLRA, the Commission's expertise in construing and applying the Mine Safety Act is highly relevant. The Commission —and not a federal district court—is in the best position to understand how miners' representatives function in practice, the nature and scope of information to which they are privy, and the impact their presence may have on a mine's operation.

[16] See, *e.g.*, *Cyprus Empire Corp.* v. *Secretary of Labor*, 15 F.M.S.H.R.C. 10, 13-15 (1993) (striking employees of mine not entitled to designate representative under 30 U.S.C. 813(f) because they do not fall within statutory definition of miners); *Emery Mining Corp.* v. *Secretary of Labor*, 10 F.M.S.H.R.C. 276, 283-286 (1988) (miners may designate representatives who do not work at mine), aff'd in part and rev'd in part *sub nom. Utah Power & Light Co.* v. *Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990); *Truex* v. *Consolidation Coal Co.*, 8 F.M.S.H.R.C. 1293, 1298 (1986) (mine operators have no right to designate miners' representatives); see also *Secretary of Labor* v. *Mid-Continent Resources, Inc.*, 12 F.M.S.H.R.C. 949, 953-954 (1990) (Commission has authority to issue declaratory relief where operator of non-union mine has refused access to miners' representative affiliated with UMWA).

[17] In that case, miners at Kerr-McGee's non-union mine designated employees of the UMWA as their walk-around representatives

In *Kerr-McGee*, the Commission held that 30 U.S.C. 813(f) "does not prohibit miners from designating agents of a union as their walkaround representatives on the basis that such miners are not represented by the union for collective bargaining purposes," because "the concept of representative as it has developed under the NLRA is not determinative of the miners' representative designation process under [30 C.F.R.] Part 40." 15 F.M.S.H.R.C. at 361-362. In so holding, the Commission relied on its prior decision in *Emery Mining Corp.* v. *Secretary of Labor*, *supra*, which held that 30 U.S.C. 813(f) "imposes no employee-status limitation" on the miners' choice of their representatives. *Kerr-McGee*, 15 F.M.S.H.R.C. at 360 (quoting *Emery Mining Corp.*, 10 F.M.S.H.R.C. at 284). The Commission found "no basis" in the Act or regulations for limiting that right "to situations where the designated representative is a member of a union that also represents the miners for collective bargaining purposes under the NLRA." *Kerr-McGee*, 15 F.M.S.H.R.C. at 361.

The Commission in *Kerr-McGee* thoroughly addressed the operator's claim that enforcement of the Secretary's walk-around regulations in that setting would conflict with the NLRA. The Commission concluded that there is no reason to incorporate the NLRA's concept of a collective bargaining representative into the meaning of "representative" under 30 U.S.C. 813(f). 15 F.M.S.H.R.C. at 362; see *id.* at 359 & n.8 (Secretary rejected, in regu-

under the Act. The Secretary issued a citation to the mine operator because it refused to post the notice of designation, as required by 30 C.F.R. 40.4. The Commission framed the issue before it as "whether miners may choose as their representative for 'walk-around' purposes under section 103(f) of the Mine Act [30 U.S.C. 813(f)] * * * a union, or the agent of a union, that is not the miners' collective bargaining representative under the National Labor Relations Act." 15 F.M.S.H.R.C. at 352. That is the precise issue posed by petitioner's challenge to the anticipated enforcement of the regulations in this case.

latory preamble, adoption of NLRA definition of "representative."). The Commission also considered this Court's recent decision in *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841 (1992)—upon which petitioner relies (Br. 12, 25-26, 44)—and concluded that it did not compel a different result. *Lechmere*, the Commission explained, involved the degree to which the NLRA permitted access by "nonemployee union organizers to employers' private property," but had nothing to do with the separate question whether the Mine Safety Act's walk-around rights must yield to mine operators' property rights. *Kerr-McGee*, 15 F.M.S.H.R.C. at 362.[18]

[18] Petitioner argues (Br. 25-29) that the Commission erred in concluding that the NLRA does not give mine operators a virtually unfettered right to exclude union employees from their property. Petitioner overreads *Lechmere*. In *Lechmere*, this Court reaffirmed (112 S. Ct. at 848) its prior holdings that the right to organize under the NLRA does not overcome an employer's common law right to exclude trespassers, unless other "reasonable efforts by the union * * * will [not] enable it to reach the employees" or "the employer[] * * * discriminate[s] against the union by allowing other distribution." *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). This Court has never held, however, that the NLRA itself confers on employers a right to exclude union personnel from their property; it has simply held that the right to organize given to employees under the NLRA permits union organizers to overcome employers' state-law property rights only in limited circumstances. See *Lechmere*, 112 S. Ct. at 846-848. The analysis in *Lechmere* therefore has no bearing on the degree to which the Mine Safety Act overcomes mine operators' property rights. After all, permitting *any* non-employee representative of miners to participate in mine inspections in effect authorizes what would otherwise be a trespass.

Moreover, neither the Secretary nor the Commission has ever taken the position that it would be appropriate for a miners' representative to engage in any union organizing activity in the course of his duties as a representative. See J.A. 49-50 (assuring petitioner that miners' representatives would be permitted to engage only in conduct authorized by the Mine Safety Act). It is clear under *Lechmere* that the NLRA does not force an employer to

The Commission recognized, however, that allowing a union agent "limited access to mine property * * * is subject to possible abuse." *Kerr-McGee*, 15 F.M.S.H.R.C. at 361. Finding the allegation that such abuse would occur to be merely speculative, however, the Commission held that actual instances of abuse could be "addressed on an individual basis * * * while generally preserving the right of miners to select representatives of their choice." *Id.* at 361-362 (citing *Utah Power & Light Co.* v. *Secretary of Labor*, 897 F.2d 447, 452 (10th Cir. 1990)). Indeed, in this case, petitioner was assured by MSHA that "the right of the miners' representative * * * to participate" in inspections "is not an uncontrolled access right to the mine property to engage in any activity that the miners' representative wants." J.A. 49. Rather, "[t]he MSHA inspector controls the inspection, and it is the inspector's responsibility to ensure that the miners' representative [*sic*] activities are limited to aiding the inspection and not to engage in other unrelated activities." *Id.* at 50.

Thus, *Kerr-McGee* demonstrates that the process for administrative and judicial review provided in the Mine Safety Act is perfectly suited to consideration of petitioner's claim of a statutory conflict.[19] Petitioner is obviously

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permit union access *for that purpose*, absent unusual circumstances. That holding does not speak at all to the question whether the Mine Safety Act requires union personnel to be permitted on a mine operator's property *for an entirely separate purpose*.

[19] *Kerr-McGee* also illustrates the point that administrative tribunals routinely decide disputes that involve statutes in addition to those they directly administer. See, *e.g.*, *Local 1976, United Bhd. of Carpenters* v. *NLRB*, 357 U.S. 93, 109-111 (1958) (reconciling NLRA and Interstate Commerce Act); *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 46-49 (1942) (reconciling NLRA and maritime law). Accord *City of Rochester* v. *Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979) (Federal Aviation Administration, and not district court, has original jurisdiction to resolve alleged conflict between Federal Aviation Act and National Environmental Policy Act); *Connors* v. *Amax Coal Co.*, 858 F.2d 1226, 1230-1231 (7th Cir. 1988) (Benefits Review Board has jurisdiction to resolve case involving federal common law claims and claims under Employee Retirement Income Security Act, as well as under Black Lung Benefits Act); *Carey* v. *O'Donnell*, 506 F.2d 107, 110 (D.C. Cir. 1974), cert. denied, 419 U.S. 1110 (1975).

dissatisfied with the outcome in *Kerr-McGee* (see Pet. Br. 28 n.27, 41 n.40; see also American Mining Cong. Amici Br. 13, 17-18), but a mere disagreement with the agency's position on the merits of a particular issue is an inadequate ground for bypassing the special statutory review mechanism enacted by Congress. There can be no doubt that the decision in *Kerr-McGee*, if followed in a case involving petitioner, would provide an entirely adequate basis for judicial review in the court of appeals. *Connors*, 858 F.2d at 1231; see *Myers*, 303 U.S. at 48-50. The very availability of that avenue of review destroys whatever force petitioner's claim of statutory conflict might otherwise have lent to its invocation of the district court's jurisdiction.[20]

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[20] Contrary to petitioners' assertion (Br. 27, 28-29) this case is far different from *Traynor* v. *Turnage*, *supra*. The question in *Traynor* was whether a statutory provision barring judicial review of individual benefit determinations prevented a district court from hearing a claim that a Veterans Administration regulation was inconsistent with another federal statute. The Court held that the district court had jurisdiction to resolve the claim of statutory conflict because Congress did not intend to "foreclose[] [that claim] from judicial review," 485 U.S. at 545, when it precluded review of individual benefit determinations. In *Traynor*, if the district court did not have jurisdiction, no court did. Under the Mine Safety Act, by contrast, the court of appeals has jurisdiction to consider precisely the same issue that petitioner sought to bring before the district court. Petitioner should not be permitted to undermine the statutory scheme in that manner. See *City of Rochester*, 603 F.2d at 936 ("The policy behind having a special review procedure in the first place * * * disfavors bifurcating jurisdiction over various substantive grounds between district court and the court of appeals."); *TRAC*, 750 F.2d at 72, 78-79 (where statute provides direct review in court of appeals, action for unreasonable delay must also be to court of appeals).

2. Petitioner also argues (Br. 29-30) that the Commission is incompetent to decide its due process challenge, and that the constitutional aspect of this case therefore justified the district court's intervention. That claim is without merit.

a. The Commission has the power to decide constitutional issues that arise in proceedings under the Mine Safety Act's administrative and judicial review scheme. As the court below reasoned, the Mine Safety Act "does not distinguish between challenges to orders based on constitutional grounds or conflict with other statutes and challenges based on misapplication of the Act itself." Pet. App. 8. And the Commission has demonstrated that it is competent to decide constitutional issues, having resolved a wide range of such issues, including due process challenges, under the Act. See, *e.g.*, *Secretary of Labor* v. *Jim Walter Resources, Inc.*, 9 F.M.S.H.R.C. 1305, 1306-1307 (1987) (upholding as consistent with due process the Commission's temporary reinstatement procedures), aff'd, 920 F.2d 738 (11th Cir. 1990); *Secretary of Labor* v. *Alabama By-Products Corp.*, 4 F.M.S.H.R.C. 2128, 2129-2130 (1982) (rejecting vagueness challenge to safety standard promulgated under Act, since reasonably prudent person would have recognized hazard warranting corrective action); see also *Secretary of Labor* v. *Richardson*, 3 F.M.S.H.R.C. 8, 21-28 (1981) (rejecting equal protection challenge to provision of Act), aff'd, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983).[21]

[21] Amici erroneously claim (American Mining Cong. Br. 14, 15-16) that in *Kaiser Coal Corp.* v. *Secretary of Labor*, 10 F.M.S.H.R.C. 1165 (1988), the Commission took a narrow view of its jurisdiction to decide constitutional issues. *Kaiser Coal* did not even involve a constitutional challenge to the Act or its regulations. Rather, in that case, the Commission simply held that in the absence of any "extant enforcement action by the Secretary," *id.* at 1171, as required by the Act's jurisdictional provisions, *id.* at 1169; see 30 U.S.C. 815(b), the Commission ALJs had no jurisdiction to grant declaratory relief. The Commission has reaffirmed that principle on several occasions. *Mid-Continent Resources, Inc.*, 12 F.M.S.H.R.C. at 955; *Beaver Creek Coal Co.* v. *Secretary of Labor*, 11 F.M.S.H.R.C. 2428, 2430-2431 (1989); *Climax Molybdenum Co.* v. *Secretary of Labor*, 2 F.M.S.H.R.C. 2748, 2752 (1980), aff'd, 703 F.2d 447, 452 (10th Cir. 1983).

Thus, this Court's general observation that administrative agencies normally do not decide constitutional issues, see *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977), does not apply to the Commission. That is especially so in this case, where the Commission would not be asked to hold a provision in its organic act unconstitutional (see, *e.g.*, *Weinberger* v. *Salfi*, 422 U.S. 749, 761 (1975), discussing *Johnson* v. *Robison*, 415 U.S. 361, 367-368 (1974)), but would be asked to consider only a procedural due process issue concerning the timing of an administrative hearing. The Commission could address that issue by expediting the hearing before an ALJ and the Commission, if petitioner requested it to do so. Neither petitioner nor its amici have cited any decision questioning the Commission's power or competence to decide such a due process issue. Even if there were some question on that score, however, judicial review of the issue remains available in the court of appeals, where it would be fully considered on the basis of the factual record developed before the Commission. Compare *Salfi*, 422 U.S. at 761-762. Petitioner's assertion that the Commission lacks authority to award it relief on constitutional grounds therefore furnishes no basis for it to bypass the statutory framework and sue in the district court.

b. Petitioner makes an additional due process argument. Apart from the question of the adequacy of administrative and judicial review provided by the Mine Safety Act, petitioner challenges the procedures provided by the Mine Safety Act. In petitioner's view, the Act impermissibly puts it to a choice between complying with a citation MSHA may issue and forgoing its "rights" under the NLRA, and that district court intervention was required

to avoid putting it to that assertedly unconstitutional choice.[22] That claim is wholly baseless, and cannot form the basis for jurisdiction in the district court.

Petitioner contends that it wants only a " 'meaningful' [pre-deprivation] administrative hearing on its statutory-conflict claim." Pet. Br. 34-35, citing *Mathews* v. *Eldridge*, 424 U.S. at 331. In the due process cases upon which petitioner relies, see *Mathews* v. *Eldridge*, *supra*; *Southern Ohio Coal Co.* v. *Donovan*, 774 F.2d 693 (1985), amended, 781 F.2d 57 (6th Cir. 1986), the courts held that a party was subject to a deprivation of a property or liberty interest *before* a meaningful hearing, and that deprivation assertedly caused an irreparable injury that could not be cured by a post-hearing remedy. This Court has never held, however, that every pre-hearing disadvantage implicating a liberty or property interest is impermissible. Rather, a "claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing." *Eldridge*, 424 U.S. at 331.

In this case, petitioner has not demonstrated that the Mine Safety Act review scheme either deprives it of a protected interest prior to a hearing, or that any such injury cannot be cured through a post-hearing remedy. First, if MSHA issues a citation, petitioner may choose not to comply, and thereby stand on its asserted "right" under the NLRA until after the administrative process has been

[22] As we have argued, the NLRA itself gives petitioner no right to exclude union organizers from its property. That right comes from extant property law, and this Court's decision in *Lechmere, Inc.* v. *NLRB*, *supra*, simply holds that the NLRA overcomes those property rights only in limited circumstances. By contrast, 30 U.S.C. 813(f) explicitly gives miners the right to designate representatives of their choice, and gives those representatives the right to enter mine property in the exercise of their statutory duties. Unlike the NLRA, therefore, the Mine Act quite explicitly overcomes whatever state-law interest a mine operator has in excluding outsiders from its property.

completed.[23] In that process, MSHA simply proposes penalties against an operator. See 30 U.S.C. 815(a), (b)(1)(A) and (b)(1)(B). Only the Commission has authority actually to assess a penalty, 30 U.S.C. 820(i), and it must do so *de novo* in light of six statutory criteria. *Sellersburg Stone Co.* v. *Federal Mine Safety & Health Review Comm'n*, 736 F.2d 1147, 1150-1152 (7th Cir. 1984). A mine operator then has a right to judicial review of the Commission's final decision. 30 U.S.C. 816.[24] An operator need not actually pay any penalties until *after* the case is decided on the merits. The Mine Safety Act

[23] Despite its assumption that the maximum statutory penalties would have been imposed in this case had the administrative process been permitted to work, any such penalties remain purely hypothetical. The record is devoid of any evidence that MSHA has even discussed the imposition of penalties for failure to post the designation of representatives in this case. Furthermore, as the court of appeals held (Pet. App. 12), the Mine Safety Act delays payment of penalties (including payment of any daily penalties under 30 U.S.C. 820(b) (Supp. III 1991)) until after the administrative process has run its course. Thus, as we discuss in text, petitioner can be subject to a "deprivation" under the statute's penalty scheme only *after* it has been afforded a full evidentiary hearing and appeal rights. See 30 U.S.C. 815(a) and (d), 820(i) and (j), 823(d)(2)(A)(i).

[24] Petitioner exaggerates the threat of daily penalties under the Act to which it may be subject in this case. See Pet. Br. 30; see also American Mining Cong. Amici Br. 22. Testimony of MSHA officials contradicts petitioner's claim (Br. 7 n.11) that such penalties would have inevitably been sought in this case. J.A. 48. Moreover, petitioner mischaracterizes (Br. 6, 33) the events in *Kerr-McGee*. There, after MSHA issued a citation to the operator for failing to post the designation of representatives, MSHA's District Manager simply informed the operator that he would "recommend implementation of a civil penalty, under [30 U.S.C. 820(b)] for each day" that the operator failed to abate the violation. J.A. 42-43. Moreover, the record indicates that if Kerr-McGee had sought an expedited hearing before the Commission, MSHA might not have sought daily penalties while that challenge was pending. See J.A. 37.

therefore imposes no pre-hearing deprivation of any sort on a mine operator.[25]

A mine operator unwilling to take the risk that it will lose on the merits of its challenge to a citation has the option to abate the violation pending the outcome of the administrative and judicial process, thereby preventing any occasion for assessment of daily penalties. On the facts of this case, if MSHA had issued a citation, abatement would have consisted entirely of posting the designation of miners' representatives at the mine, pursuant to 30 C.F.R. 40.4. Only if an inspection occurred during the pendency of the administrative process would the union even be in a position to engage in the organizing activities about which petitioner speculates. Even then petitioner could seek procedural protections. The Mine Safety Act itself authorizes the Commission to grant temporary relief from MSHA orders in certain circumstances, see 30 U.S.C. 815(b)(2), and Commission rules provide for expedited hearings on challenges to MSHA citations on as little as four days' notice, or even earlier if all parties consent. See 29 C.F.R. 2700.52. Finally, an operator may seek temporary relief from the court of appeals. See 30 U.S.C. 816(a)(3). See also *TRAC*, 750 F.2d at 72, 78-79.

[25] Even if there were some pre-hearing deprivation by virtue of the potential for incurring civil penalties while the administrative process runs its course, such a deprivation would be present in *every* enforcement dispute under the Mine Safety Act. There is no logical reason why an operator contesting a citation based on an asserted "conflict" with another federal statute should be permitted to sue in the district court, while an operator contesting a citation on the ground that it conflicts with the Mine Safety Act should be required to adhere to the statutory review process. Petitioner's claim here therefore amounts to a frontal assault on the Act's administrative review scheme. The Act's review scheme, however, is equally adequate in both instances. As this Court has recognized, the safety issues peculiar to the mining industry justify extensive regulation, and mine operators are on notice that their property interests are subject to substantial intrusions to protect the health and safety of miners. See *Donovan* v. *Dewey*, 452 U.S. 594, 603 (1981). The procedural mechanisms protecting health and safety are important regardless of the ground on which the underlying agency action is being challenged.

Thus, petitioner's claim fails to meet even the threshold requirement for a due process claim—that the agency conduct at issue deprived it of a protected interest prior to any hearing. Even if that condition were thought to be satisfied by virtue of MSHA's mere proposal of penalties, however, petitioner's due process claim would nonetheless be without merit, because any such "deprivation" could be cured through post-hearing procedures. It is plain that the mere prospect of the future assessment of monetary penalties is not the sort of irreparable injury that requires a pre-deprivation hearing. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244 (1980); see also *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 611 (1974) (where only property interests are involved, postponement of hearing does not deny due process if adequate review is ultimately provided); *Phillips* v. *Commissioner*, 283 U.S. 589, 596-597 (1931); *Mackey* v. *Montrym*, 443 U.S. 1, 13 (1979). In this case, as in *Eldridge*, the opportunity for a post-"deprivation" hearing "fully comport[s] with due process." *Eldridge*, 424 U.S. at 349.[26]

[26] Even assuming, moreover, that the presence at its mine of a miners' representative who is a union employee would impinge upon a property interest of petitioner, such an injury is plainly not "irreparable" in any constitutionally significant sense. As the court of appeals held (Pet. App. 14), there is no reason to believe that representatives acting within the scope of the Mine Safety Act would cause petitioner irreparable harm, or that MSHA officials would permit them to abuse their Mine Safety Act rights during the course of an inspection. See *Kerr-McGee*, 15 F.M.S.H.R.C. at 361-362. The Commission has consistently recognized the limits on the role of miners' representatives under the Act. See *Council of S. Mountains, Inc.* v. *Martin County Coal Corp.*, 6 F.M.S.H.R.C. 206 (1984), aff'd, 751 F.2d 1418 (D.C. Cir. 1985); *United Mine Workers* v. *Secretary of Labor*, 5 F.M.S.H.R.C. 807 (1983), aff'd, 725 F.2d

Finally, relying on this Court's decision in *Eldridge*, petitioner seeks to characterize its due process claim as "collateral" to the merits of the underlying dispute, and therefore subject to judicial review on that ground. See Pet. Br. 35, 40. In *Eldridge*, however, the Court recognized that the plaintiff claimed that he would be harmed by the denial of a pre-deprivation hearing "in a way not recompensable through retroactive" relief. 424 U.S. at 331. As we have shown, that is not the case here.[27] In substance, petitioner's due process claim is nothing more than a label attached to a garden-variety objection to a citation as inconsistent with the statute, in an effort to circumvent the statutory review process. As it has in the past, this Court should reject that effort, especially since no citation has yet been issued. See *Ringer*, 466 U.S. at 614; *MCorp Financial, Inc.*, 112 S. Ct. at 464-466; *ITT World Communications, Inc.*, 466 U.S. at 468. If a citation should be issued at a later date—and if petitioner believes at that time that it will be irreparably injured—it could seek an expedited hearing before the Commission. If that request were denied—and if petitioner believed that the denial constituted a "collateral order"—it then could seek judicial review in the court of appeals under the rationale of *Eldridge* that petitioner invokes. See *Jim Walter Resources, Inc.* v. *Federal Mine Safety & Health Review Comm'n*, 920 F.2d 738 (11th Cir. 1990). In no event, however, would review lie in the district court.

126 (D.C. Cir. 1984) (Table); *United Mine Workers* v. *Secretary of Labor*, 5 F.M.S.H.R.C. 1519 (1983).

[27] Petitioner contends (Br. 24-25) that its constitutional claim is at least "colorable" and that the district court therefore had jurisdiction, even if only to reject its claim. As we have shown, however, petitioner's due process claims are "patently without merit," *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70 (1978) (emphasis omitted), and thus are subject to dismissal "for want of jurisdiction." *Ibid.* See also *Ringer*, 466 U.S. at 608 n.4; *Hagans* v. *Lavine*, 415 U.S. 528, 536-538 (1974).

II. EVEN IF THE DISTRICT COURT WAS NOT FORECLOSED FROM EXERCISING JURISDICTION, IT NEVERTHELESS WAS REQUIRED TO DISMISS THE COMPLAINT

Even if the district court was not altogether precluded from exercising jurisdiction in this case, it was required to dismiss the complaint because petitioner has no cause of action, its claims are not ripe for judicial review, and administrative remedies have not been exhausted.

A. Petitioner Has No Cause Of Action

Petitioner's complaint did not specify the source of its cause of action against respondents. Although petitioner invoked the district court's federal question jurisdiction under 28 U.S.C. 1331 (see J.A. 6), that statute "does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951).[28] Accordingly, petitioner must look elsewhere to find a basis for its suit.

Although petitioner's complaint and brief in this Court both fail to identify any federal statute creating a cause

[28] Although petitioner notes (Br. 2) that it also invoked the Declaratory Judgment Act, 28 U.S.C. 2201-2202, as a basis for this suit (see J.A. 6), "the operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937). It only "authorizes relief," *ibid.*, in the nature of a "declar[ation] [of] the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. 2201(a). This Court long ago held that "the declaratory judgment procedure will not be used to pre-empt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review." *Public Service Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 246 (1952). "Responsibility for effective functioning of the administrative process cannot be thus transferred from the bodies in which Congress has placed it to the courts." *Id.* at 246-247; see also *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950).

of action, it is plain that any cause of action petitioner may have must stem from the APA. Section 10(a) of the APA, 5 U.S.C. 702, provides for judicial review at the behest of persons "suffering legal wrong because of agency action" or who are "adversely affected or aggrieved by agency action within the meaning of a relevant statute." Section 10(b) of the APA, 5 U.S.C. 703, then sets forth the form and venue of the cause of action created in Section 10(a). Section 10(b) requires that judicial review of agency action generally proceed pursuant to "the special statutory review proceeding relevant to the subject matter in a court specified by statute." 5 U.S.C. 703. In this case, of course, Congress has provided an elaborate and comprehensive administrative review scheme followed by a right of judicial review in the court of appeals. If a statute's special review procedures are inadequate, Section 10(b) provides that the cause of action created in Section 10(a) may be brought in district court. 5 U.S.C. 703. As we have shown above (see pp. 29-35, *supra*), the judicial review provisions of the Mine Safety Act are fully adequate. It follows that petitioner's APA cause of action lies only in the court of appeals, pursuant to the Mine Safety Act.

Moreover, Section 10(c) of the APA limits judicial review to "final agency action." 5 U.S.C. 704; see *Darby* v. *Cisneros*, No. 91-2045 (June 21, 1993), slip op. 6-7; *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 890-894 (1990). In this case, MSHA has not taken any final action with respect to petitioner. Petitioner's challenge is not to the facial validity of the regulatory definition of "representative" in 30 C.F.R. 40.1(b)(1). It challenges only an administrative interpretation of that regulation, communicated to it by MSHA's District Manager, under which union personnel may act as miners' representatives.[29] MSHA has not even issued a citation or otherwise instituted enforcement action against petitioner based on that interpretation. And even if MSHA *had* issued a citation and proposed a penalty, neither would constitute final agency action subject to review under the APA, *Standard Oil Co.*, 449 U.S. at 239-243, since each would (at petitioner's request) be subject to independent review by the Commission before any action by the government against petitioner could become administratively final. See *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2773-2775 (1992).[30] Thus, the district court was required to dismiss the complaint because there has been no final agency action in this case that may be challenged in a cause of action under the APA.

[29] Petitioner refers to *MSHA's* "designation" of miners' representatives as agency action that is subject to judicial review. Under the governing regulations, however, it is the employees themselves who designate" a miners' representative, without any requirement for advance approval by MSHA. 30 C.F.R. Pt. 40.

[30] If petitioner did not seek Commission review, "the citation and the proposed assessment of penalty [would] be deemed a final order of the Commission and not subject to review by any court or agency." 30 U.S.C. 815(a).

B. Petitioner's Claims Are Not Ripe For Judicial Review

Even if petitioner were challenging "final agency action" subject to review under the APA, it may not obtain injunctive or declaratory relief unless the controversy concerning designation of miners' representatives is ripe for judicial review. *Reno* v. *Catholic Social Services, Inc.*, slip op. 12-14. Petitioner contends (Br. 37-38) that its anticipation of enforcement action in the form of a citation for failure to post the designation of miners' representatives renders the controversy ripe for judicial review. The question of ripeness depends upon "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories*, 387 U.S. at 149. Contrary to petitioner's view, neither condition is met here.

First, the issues raised by petitioner are not presently fit for judicial review. The case does not raise "purely legal" issues. *Abbott Laboratories*, 387 U.S. at 149.[31] Petitioner asserts that UMWA employees, acting as miners' representatives under the Mine Safety Act, will impermissibly engage in organizing activity in contravention of the NLRA. That is a factual question about which no record has been developed. So too is the question whether there is undue danger that the representatives might gain an organizing advantage by virtue of performing their legitimate role under the Mine Safety Act. The district court has no experience with, or expertise in, the manner in which mine inspections are conducted, the role of representatives in those inspections, the nature and scope of information regarding the mine operator and its employees to which representatives are given access, as well as a host of other technical issues.

Such questions are, by contrast, within the everyday experience of the Commission. The development of a factual record therefore should take place in that forum, after MSHA has instituted enforcement action through issuance of a citation arising out of a particular refusal by petitioner to respect its employees' choice of representatives. At that point, of course, a plaintiff that sought to rely on the issuance of a citation or a proposed penalty to satisfy the ripeness requirement would then still find itself barred by the Mine Safety Act's provisions providing an exclusive avenue for review by the Commission and then the courts of appeals. "The ripeness doctrine and the

[31] The Court stressed in *Abbott Laboratories* that the plaintiffs challenged final agency action, 387 U.S. at 140-141, 148, and it held that the ripeness doctrine did not pose an independent bar to judicial review. Here, by contrast, there is no final agency action, and petitioner seeks to rely on general notions of "ripeness" to overcome that defect. The requirement of "final agency action" stems directly from the text of the APA, however, and it cannot be dispensed with by the courts in the manner petitioner proposes.

[Mine Safety Act's] jurisdictional provisions would thus dovetail neatly, and not necessarily by mere coincidence." *Reno* v. *Catholic Social Services, Inc.*, slip op. 17.

Second, this is not "a case in which the impact of [agency action] upon the petitioner[] is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Abbott Laboratories*, 387 U.S. at 152. Unlike the situation in *Abbott Laboratories* and its companion case, *Gardner* v. *Toilet Goods Ass'n*, *supra*, petitioner is not now placed in a "quandary," *Toilet Goods Ass'n*, 387 U.S. at 172; see also *Abbott Laboratories*, 387 U.S. at 153, between having to "make significant changes in [its] everyday business practices," *id.* at 154, and "expos[ure] to the imposition of strong sanctions," *ibid.*, if it chooses noncompliance. See *Toilet Goods Ass'n*, 387 U.S. at 172-173. Compliance with the challenged regulation (or abatement of a citation) would only require petitioner to post the notice designating the miners' representatives, which manifestly does not entail wholesale changes in petitioner's business practices. Even if an inspection occurred prior to resolution of its administrative challenge, permitting the designated representatives to aid in such an inspection would not result in any palpable cost to petitioner, especially since the MSHA inspector is responsible for ensuring that miners' representatives do not engage in any activities unrelated to their Mine Safety Act duties while they are at the mine. J.A. 49-50. Thus, any impact on petitioner's operations is a far cry from the "hardship" this Court recognized as characterizing a ripe controversy in *Abbott Laboratories*. See 387 U.S. at 152 ("If petitioners wish to comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies.").

For the foregoing reasons, the instant controversy is not ripe, and the suit should be dismissed for this reason

as well. Indeed, in closely analogous circumstances—and in a case decided together with *Abbott Laboratories*—this Court held that a challenge to a regulation governing access by government inspectors to a manufacturer's premises was not ripe, both because the legal challenge might depend on the factual context in which entry was sought and refused, and because the manufacturer would not suffer substantial injury if judicial review was postponed. See *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 158, 163-166 (1967).

C. Administrative Procedures Have Not Been Exhausted

Finally, and in a related vein, this case must be dismissed under principles governing exhaustion of administrative remedies. As we have explained, the Commission has the power and competence to decide the issues presented by petitioner. Petitioner errs in contending (Br. 37, 40-41) that the agency's review procedures are inadequate and that exhaustion is therefore unnecessary in this case.

The exhaustion doctrine "provides 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *McKart* v. *United States*, 395 U.S. 185, 193 (1969), quoting *Myers*, 303 U.S. at 50-51; accord *Whitney Nat'l Bank*, 379 U.S. at 419-422. The doctrine's several purposes include preventing "premature interference with agency processes," allowing the agency to "function efficiently" and "correct its own errors," providing "the parties and the courts the benefit of [agency] experience and expertise," and assuring the development of an "adequate" record. *Salfi*, 422 U.S. at 765; accord *Ringer*, 466 U.S. at 619 n.12; *McKart*, 395 U.S. at 193-194.

In this case, those purposes would be well served by requiring resort to the Mine Safety Act's "extensive review process." Pet. App. 5. The gravamen of petitioner's

complaint is that the mere presence of union personnel during inspections will severely harm its interests. The Commission's knowledge of the day-to-day workings of mines, as well as its expertise in understanding and determining the nature and scope of miners' representatives' duties and powers under the Mine Safety Act, makes it particularly important that the issues petitioner raises first be presented to the Commission. A contrary result would directly undermine Congress's determination that the Commission is to serve as the "ultimate administrative review body for disputed cases arising under the [Act]." S. Rep. No. 181, *supra*, at 13.[32] As a "quasi-judicial agency" that is independent of the Secretary and "has no enforcement responsibilities," *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986), the Commission is uniquely situated to engage in independent scrutiny of MSHA's actions in advance of judicial review.

There is no merit to petitioner's claim that resolution of the issues in this case will not benefit from administrative consideration. The Commission's decision in *Kerr-McGee Coal Corp.* v. *Secretary of Labor*, *supra*, belies any contention that the Commission cannot consider the purported conflict between the Mine Safety Act and the NLRA, and unlike the situation in *Reiter* v. *Cooper*, 113 S. Ct. 1213, 1221 (1993), the Commission has never disavowed its authority to do so. Petitioner's argument that exhaustion would be futile (Br. 41 & n.40) ignores the fact that the Commission is free to

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[32] As we explained (see pp. 34-40, *supra*), the statutory procedures are plainly adequate to protect petitioner's due process interests, and petitioner lacks even a colorable claim that it will be deprived of a liberty or property interest that cannot be cured through a post-hearing remedy. *Eldridge*, 424 U.S. at 330-331. There is therefore no merit to petitioner's contention (Br. 40-41) that the requirement of exhaustion should be excused because its challenge is to the adequacy of the administrative procedures for which immediate review is necessary to avoid irreparable harm. See Pet. Br. 41, citing *Bowen* v. *City of New York*, 476 U.S. 467 (1986), and *Barry* v. *Barchi*, 443 U.S. 55, 63 n.10 (1979).

refine its approach on a case-by-case basis, and that review by the Commission would provide an opportunity for development of a record on which petitioner's legal objections may be considered by a court of appeals. Similarly, there is no danger here, as there was in *Coit Independence Joint Venture* v. *Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561, 586-587 (1989), that the duration of agency procedures will threaten to moot claims that petitioner may have in another forum. Thus, none of the "well-established exceptions to the exhaustion doctrine" (Br. 41) is applicable here, and there is no reason to excuse petitioner from first presenting its contentions to the Commission—after receiving a citation—before seeking judicial review.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

EDWIN S. KNEEDLER
Acting Deputy Solicitor General

WILLIAM K. KELLEY
Assistant to the Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Counsel for Appellate Litigation

DEBORAH GREENFIELD
Attorney
Department of Labor

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APPENDIX

Relevant Provisions of Title 30, United States Code

§ 801. Congressional findings and declaration of purpose

Congress declares that—

(a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally

caused diseases unduly impedes and burdens commerce; and

(g) it is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

* * * * *

§ 813. Inspections, investigations, and recordkeeping

(a) Purposes; advance notice; frequency; guidelines; right of access

Authorized representatives of the Secretary or the Secretary of Health and Human Services shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety

standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health and Human Services may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws. For the purpose of making any inspection or investigation under this chapter, the Secretary, or the Secretary of Health and Human Services, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary or the Secretary of Health and Human Services, shall have a right of entry to, upon, or through any coal or other mine.

(b) Notice and hearing; subpoenas; witnesses; contempt

For the purpose of making any investigation of any accident or other occurrence relating to health

or safety in a coal or other mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person under this section, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

* * * * *

(e) Collecting information without unreasonable burden on operators

Any information obtained by the Secretary or by the Secretary of Health and Human Services under this chapter shall be obtained in such a manner as not to impose an unreasonable burden upon operators, especially those operating small businesses, consistent with the underlying purposes of this chapter. Unnecessary duplication of effort in obtaining information shall be reduced to the maximum extent feasible.

(f) Participation of representatives of operators and miners in inspections

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

(g) Immediate inspection; notice of violation or danger; determination

(1) Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this chapter or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this subchapter. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

(2) Prior to or during any inspection of a coal or other mine, any representative of miners or a miner in the case of a coal or other mine where there is no such representative, may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this chapter or of any imminent danger

which he has reason to believe exists in such mine. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation or order with respect to such danger and shall furnish the representative of miners or miner requesting such review a written statement of the reasons for the Secretary's final disposition of the case.

(h) Records and reports; compilation and publication; availability

In addition to such records as are specifically required by this chapter, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary or the Secretary of Health and Human Services may reasonably require from time to time to enable him to perform his functions under this chapter. The Secretary or the Secretary of Health and Human Services is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. Except to the extent otherwise specifically provided by this chapter, all records, information, reports, findings, citations, notices, orders, or decisions required or issued pursuant to or under this chapter may be published from time to time, may be released to any interested person, and shall be made available for public inspection.

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§ 814. Citations and orders

(a) Issuance and form of citations; prompt issuance

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

(b) Follow-up inspections; findings

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) of this section has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection

(c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(c) Exempt persons

The following persons shall not be required to be withdrawn from, or prohibited from entering, any area of the coal or other mine subject to an order issued under this section:

(1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order;

(2) any public official whose official duties require him to enter such area;

(3) any representative of the miners in such mine who is, in the judgment of the operator or an authorized representative of the Secretary, qualified to make such mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the conditions described in the order; and

(4) any consultant to any of the foregoing.

(d) Findings of violations; withdrawal order

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially con-

tribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

(e) Pattern of violations; abatement; termination of pattern

(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.

(3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.

(4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists.

* * * * *

(h) Duration of citations and orders

Any citation or order issued under this section shall remain in effect until modified, terminated or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Commission or the courts pursuant to section 815 or 816 of this title.

§ 815. Procedure for enforcement

(a) Notification of civil penalty; contest

If, after an inspection or investigation, the Secretary issues a citation or order under section 814 of this title, he shall, within a reasonable time after the termination of such inspection or investigation, notify

the operator by certified mail of the civil penalty proposed to be assessed under section 820(a) of this title for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

(b) Failure of operator to correct violation; notification; contest; temporary relief

(1)(A) If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 820(b) of this title by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary's notification of the proposed assessment of penalty. A copy of such notification of the proposed assessment of penalty shall at the same time be sent by mail to the

representative of the mine employees. If, within 30 days from the receipt of notification of proposed assessment of penalty issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the notification of proposed assessment of penalty, such notification shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a notification of proposed assessment of penalty issued under this subsection shall constitute receipt thereof within the meaning of this subsection.

(B) In determining whether to propose a penalty to be assessed under section 820(b) of this title, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) An applicant may file with the Commission a written request that the Commission grant temporary relief from any modification or termination of any order or from any order issued under section 814 of this title together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may prescribe, if—

(A) a hearing has been held in which all parties were given an opportunity to be heard;

(B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and

(C) such relief will not adversely affect the health and safety of miners.

No temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section 814 of this title. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

(c) Discrimination or interference prohibited; complaint; investigation; determination; hearing

(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of him-

self or others of any statutory right afforded by this chapter.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to

take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section), and thereafter shall issue an order based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees)

as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 816 of this title. Violations by any person of paragraph (1) shall be subject to the provisions of sections 818 and 820(a) of this title.

(d) Contest proceedings; hearings; findings; of fact; affirmance, modification, or vacatur of citation, order, or proposed penalty; procedure before Commission

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 814 of this title, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 814 of this title, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 814 of this title, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 814 of this title, the Secretary shall immediately advise the Commission

of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 814 of this title.

§ 816. Judicial review of Commission orders

(a) Petition by person adversely affected or aggrieved; temporary relief

(1) Any person adversely affected or aggrieved by an order of the Commission issued under this chapter may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court within 30 days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of title 28.

Upon such filing, the court shall have exclusive jurisdiction of the proceeding and of the questions determined therein, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside, in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Commission may modify or set aside its original order by reason of such modified or new findings of fact. Upon the filing of the record after such remand proceedings, the jurisdiction of the court shall be exclusive and its judgment and degree shall be final,

except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28.

(2) In the case of a proceeding to review any order or decision issued by the Commission under this chapter, except an order or decision pertaining to an order issued under section 817(a) of this title or an order or decision pertaining to a citation issued under section 814(a) or (f) of this title, the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceeding, if—

(A) all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;

(B) the person requesting such relief shows that there is a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and

(C) such relief will not adversely affect the health and safety of miners in the coal or other mine.

(3) In the case of a proceeding to review any order or decision issued by the Panel under this chapter, the court may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate pending final determination of the proceeding, if—

(A) all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief; and

(B) the person requesting such relief shows that there is a substantial likelihood that he will

prevail on the merits of the final determination of the proceeding.

(b) Petition by Secretary for review or enforcement of final Commission orders

The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in the Court of Appeals for the District of Columbia Circuit, and the provisions of subsection (a) shall govern such proceedings to the extent applicable. If no petition for review, as provided in subsection (a) of this section, is filed within 30 days after issuance of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Secretary after the expiration of such 30-day period. In any such case, as well as in the case of a non-contested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 815 of this title, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the operator named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a) of this section, the court of appeals may assess the penalties provided in section 820 of this title, in addition to invoking any other available remedies.

(c) Stay of order or decision of Commission or Panel

The commencement of a proceeding under this section shall not, unless specifically ordered by the court, operate as a stay of the order or decision of the Commission or the Panel.

* * * * *

§ 818. Injunctions

(a) Civil action by Secretary

(1) The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal or other mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent—

(A) violates or fails or refuses to comply with any order or decision issued under this chapter,

(B) interferes with, hinders, or delays the Secretary or his authorized representative, or the Secretary of Health and Human Services or his authorized representative, in carrying out the provisions of this chapter,

(C) refuses to admit such representatives to the coal or other mine,

(D) refuses to permit the inspection of the coal or other mine, or the investigation of an accident or occupational disease occuring in, or connected with, such mine,

(E) refuses to furnish any information or report requested by the Secretary or the Secretary of Health and Human Services in furtherance of the provisions of this chapter, or

(F) refuses to permit access to, and copying of, such records as the Secretary or the Secretary of Health and Human Services determines necessary in carrying out the provisions of this chapter.

(2) The Secretary may institute a civil action for relief, including permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which the coal or other mine is located or in which the operator of such mine has his principal office whenever the Secretary believes that the operator of a coal or other mine is engaged in a pattern of violation of the mandatory health or safety standards of this chapter, which in the judgment of the Secretary constitutes a continuing hazard to the health or safety of miners.

(b) Jurisdiction; relief; findings of Commission or Secretary

In any action brought under subsection (a) of this section, the court shall have jurisdiction to provide such relief as may be appropriate. In the case of an action under subsection (a)(2) of this section, the court shall in its order require such assurance or affirmative steps as it deems necessary to assure itself that the protection afforded to miners under this chapter shall be provided by the operator. Temporary restraining orders shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure, as amended, except that the time limit in such orders, when issued without notice, shall be seven days from the date of entry. Except as otherwise provided herein, any relief granted by the court to enforce any order under paragraph (1) of subsection (a) of this section shall continue in effect until the completion or final termination of all proceedings for review of such order under this subchapter, unless prior thereto, the district court granting such relief sets it aside or modifies it. In any action instituted under this section to enforce an order or decision issued by the Commission or the Secretary after a public hearing in accordance with section 554 of title 5, the findings of the Commission or the Secretary, as the case may be, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

§ 819. Posting of orders and decisions

(a) Mine office; bulletin board

At each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine. There shall be a bulletin board at such office or located at a conspicuous place near an entrance of such mine, in such manner that orders, citations, notice and decisions required by law or regulation to be posted, may be posted thereon, and be easily visible to all persons desiring to read them, and be protected against damage by weather and against unauthorized removal. A copy of any order, citation, notice or decision required by this chapter to be given to an operator shall be delivered to the office of the affected mine, and a copy shall be immediately posted on the bulletin board of such mine by the operator or his agent.

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(b) Distribution of orders, citations, notices, and decisions

The Secretary shall (1) cause a copy of any order, citation, notice, or decision required by this chapter to be given to an operator to be mailed immediately to a representative of the miners in the affected coal or other mine, and (2) cause a copy thereof to be mailed to the public official or agency of the State charged with administering State laws, if any, relating to health or safety in such mine. Such notice, order, citation, or decision shall be available for public inspection.

(c) Compliance

In order to insure prompt compliance with any notice, order, citation, or decision issued under this chapter, the authorized representative of the Secretary may deliver such notice, order, citation, or decision to an agent of the operator, and such agent shall immediately take appropriate measures to insure compliance with such notice, order, citation, or decision.

(d) Filing; designation of health and safety officers

Each operator of a coal or other mine subject to this chapter shall file with the Secretary the name and address of such mine and the name and address of the person who controls or operates the mine. Any revisions in such names or addresses shall be promptly filed with the Secretary. Each operator of a coal or other mine subject to this chapter shall designate a responsible official at such mine as the principal officer in charge of health and safety at such

mine, and such official shall receive a copy of any notice, order, citation, or decision issued under this chapter affecting such mine. In any case where the mine is subject to the control of any person not directly involved in the daily operations of the coal or other mine, there shall be filed with the Secretary the name and address of such person and the name and address of a principal official of such person who shall have overall responsibility for the conduct of an effective health and safety program at any coal or other mine subject to the control of such person, and such official shall receive a copy of any notice, order, citation, or decision issued affecting any such mine. The mere designation of a health and safety official under this subsection shall not be construed as making such official subject to any penalty under this chapter.

§ 820. Penalties

(a) Civil penalty for violation of mandatory health or safety standards

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $50,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

(b) Civil penalty for failure to correct violation for which citation has been issued

Any operator who fails to correct a violation for which a citation has been issued under section 814(a)

of this title within the period permitted for its correction may be assessed a civil penalty of not more than $5,000 for each day during which such failure or violation continues.

(c) Liability of corporate directors, officers, and agents

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 815(c) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

(d) Criminal penalties

Any operator who willfully violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under section 814 of this title and section 817 of this title, or any order incorporated in a final decision issued under this subchapter, except an order incorporated in a decision under subsection (a) of this section or section 815(c) of this title, shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for

a violation committed after the first conviction of such operator under this chapter, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or both.

(e) Unauthorized advance notice of inspections

Unless otherwise authorized by this chapter, any person who gives advance notice of any inspection to be conducted under this chapter shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or both.

* * * * *

(i) Authority to assess civil penalties

The Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

(j) Payment of penalties; interest

Civil penalties owed under this chapter shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United

States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order.

(k) Compromise, mitigation, and settlement of penalty

No proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court.

* * * * *

§ 823. Federal Mine Safety and Health Review Commission

(a) Establishment; membership; chairman

The Federal Mine Safety and Health Review Commission is hereby established. The Commission shall consist of five members, appointed by the President by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter. The President shall designate one of the members of the Commission to serve as Chairman.

(b) Terms; personnel; administrative law judges

(1) The terms of the members of the Commission shall be six years, except that—

(A) members of the Commission first taking office after November 9, 1977, shall serve, as designated by the President at the time of appointment, one for a term of two years, two for a term of four years and two for a term of six years; and

(B) a vacancy caused by the death, resignation, or removal of any member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term.

Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(2) The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission. The Commission shall appoint such employees as it deems necessary to assist in the performance of the Commission's functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, relating to classification and general pay rates. Upon the effective date of the Federal Mine Safety and Health Amendments Act of 1977, the administrative law judges assigned to the Arlington, Virginia, facility of the Office of Hearings and Appeals, United States Department of the Interior, shall be automatically transferred in grade and position to the Federal Mine Safety and Health Review Commission. Notwithstanding the provisions of section 559 of title 5, the incumbent Chief Administrative

Law Judge of the Office of Hearings and Appeals of the Department of the Interior assigned to the Arlington, Virginia facility shall have the option, on the effective date of the Federal Mine Safety and Health Amendments Act of 1977, of transferring to the Commission as an administrative law judge, in the same grade and position as the other administrative law judges. The administrative law judges (except those presiding over Indian Probate Matters) assigned to the Western facilities of the Office of Hearings and Appeals of the Department of the Interior shall remain with that Department at their present grade and position or they shall have the right to transfer on an equivalent basis to that extended in this paragraph to the Arlington, Virginia administrative law judges in accordance with procedures established by the Director of the Office of Personnel Management. The Commission shall appoint such additional administrative law judges as it deems necessary to carry out the functions of the Commission. Assignment, removal, and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5362 and 7521 of title 5.

(c) Delegation of powers

The Commission is authorized to delegate to any group of three or more members any or all of the powers of the Commission, except that two members shall constitute a quorum of any group designated pursuant to this paragraph.

(d) Proceedings before administrative law judge; administrative review

(1) An administrative law judge appointed by the Commission to hear matters under this chapter shall

hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the chief administrative law judge of the Commission or by the Commission; and shall make a decision which constitutes his final disposition of the proceedings. The decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2). An administrative law judge shall not be assigned to prepare a recommended decision under this chapter.

(2) The Commission shall prescribe rules of procedure for its review of the decisions of administrative law judges in cases under this chapter which shall meet the following standards for review:

(A) (i) Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. Review by the Commission shall not be a matter of right but of the sound discretion of the Commission.

(ii) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(I) A finding or conclusion of material fact is not supported by substantial evidence.

(II) A necessary legal conclusion is erroneous.

(III) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission.

(IV) A substantial question of law, policy or discretion is involved.

(V) A prejudicial error or procedure was committed.

(iii) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations, or principal authorities relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass. Review by the Commission shall be granted only by affirmative vote of two of the Commissioners present and voting. If granted, review shall be limited to the questions raised by the petition.

(B) At any time within 30 days after the issuance of a decision of an administrative law judge, the Commission may in its discretion (by affirmative vote of two of the Commissioners present and voting) order the case before it for review but only upon the ground that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented. The Commission shall state in such order the specific issue of law, Commission policy, or novel question of policy involved. If a party's petition for discretionary review has been granted, the Commission shall not raise or consider additional issues in such review proceedings except in compliance with the requirements of this paragraph.

(C) For the purpose of review by the Commission under paragraph (A) or (B) of this subsection, the record shall include: (i) all matters constituting the record upon which the decision of the administrative law judge was based; (ii) the rulings upon proposed

findings and conclusions; (iii) the decision of the administrative law judge; (iv) the petition or petitions for discretionary review, responses thereto, and the Commission's order for review; and (v) briefs filed on review. No other material shall be considered by the Commission upon review. The Commission either may remand the case to the administrative law judge for further proceedings as it may direct or it may affirm, set aside, or modify the decision or order of the administrative law judge in conformity with the record. If the Commission determines that further evidence is necessary on an issue of fact it shall remand the case for further proceedings before the administrative law judge.

(The provisions of section 557(b) of title 5 with regard to the review authority of the Commission are expressly superseded to the extent that they are inconsistent with the provisions of subparagraphs (A), (B), and (C) of this paragraph.)

(e) Witnesses and evidence; subpoenas; contempt

In connection with hearings before the Commission or its administrative law judges under this chapter, the Commission and its administrative law judges may compel the attendance and testimony of witnesses and the production of books, papers, or documents, or objects, and order testimony to be taken by deposition at any stage of the proceedings before them. Any person may be compelled to appear and depose and produce similar documentary or physical evidence, in the same manner as witnesses may be compelled to appear and produce evidence before the Commission and its administrative law judges. Witnesses shall be paid the same fees and mileage that

are paid witnesses in the courts of the United States and at depositions ordered by such courts. In case of contumacy, failure, or refusal of any person to obey a subpoena or order of the Commission or an administrative law judge, respectively, to appear, to testify, or to produce documentary or physical evidence, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides, or transacts business, shall, upon the application of the Commission, or the administrative law judge, respectively, have jurisdiction to issue to such person an order requiring such person to appear, to testify, or to produce evidence as ordered by the Commission or the administrative law judge, respectively, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

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FOR ARGUMENT

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No. 92-896

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THUNDER BASIN COAL COMPANY,
Petitioner,
v.

ROBERT B. REICH, as Secretary of Labor; WILLIAM J. TATTERSALL, as Assistant Secretary of Labor For Mine Safety and Health; WILLIAM HOLGATE, as District Manager, Coal Mine Safety and Health Administration of the United States Department of Labor; Mine Safety and Health Administration of the United States Department of Labor,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

THOMAS F. LINN
ATLANTIC RICHFIELD COMPANY
555 17th Street, 20th Floor
Denver, Colorado 80202
(303) 293-4234

CHARLES W. NEWCOM
(Counsel of Record)
J. MARK BAIRD
SHERMAN & HOWARD
3000 First Interstate Tower North
633 Seventeenth Street
Denver, Colorado 80202
(303) 297-2900

WAYNE S. BISHOP
STEWART A. BLOCK
ACKERSON & BISHOP
1275 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20004
(202) 637-0319
Counsel for Petitioner

Date: August 5, 1993

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE GOVERNMENT HAS FAILED TO ESTABLISH THAT CONGRESS INTENDED TO PRECLUDE PRE-ENFORCEMENT REVIEW	2
II. THE DISTRICT COURT ALSO HAS JURISDICTION OVER PETITIONER'S CLAIMS DUE TO THE INADEQUACY OF MEANINGFUL REVIEW UNDER THE MINE ACT	9
III. PETITIONER STATED A COGNIZABLE CLAIM	15
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

	Page
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)	*passim*
Bituminous Coal Operators' Ass'n v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977)	7
Block v. Community Nutrition Inst., 467 U.S. 340 (1984)	8
Board of Governors v. MCorp Fin., Inc., —— U.S. ——, 112 S.Ct. 459 (1991)	9
Ciba-Geigy Corp. v. EPA, 801 F.2d 430 (D.C. Cir. 1986)	15
City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958)	9
Columbia Broadcasting Sys., Inc. v. United States, 316 U.S. 407 (1942)	16
Darby v. Cisneros, —— U.S. ——, 61 U.S.L.W. 4679 (U.S. June 21, 1993)	16, 19
Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950)	9
FTC v. Standard Oil Co., 449 U.S. 232 (1980)	9, 17
Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980)	16
International Union, UMWA v. Martin, 785 F. Supp. 1025 (D.D.C. 1992)	4
Lechmere, Inc. v. NLRB, —— U.S. ——, 112 S.Ct. 841 (1992)	11
Mathews v. Eldridge, 424 U.S. 319 (1976)	10
McNary v. Haitian Refugee Ctr. Inc., 498 U.S. 479 (1991)	7, 10
Reno v. Catholic Social Serv., Inc., —— U.S. ——, 61 U.S.L.W. 4652 (U.S. June 18, 1993)	5, 10, 17, 18
Society of Professional Journalists v. Secretary of Labor, 616 F. Supp. 569 (D. Utah 1985), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987)	3-4
Thunder Basin Coal Co. v. Martin, No. 91-CV-0050-B (D. Wyo. March 13, 1992)	12
Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967)	17, 18
Traynor v. Turnage, 485 U.S. 535 (1988)	7, 10, 12, 20
United States v. Erika, Inc., 456 U.S. 201 (1982)	8

TABLE OF AUTHORITIES—Continued

	Page
United States v. Storer Broadcasting Co., 351 U.S. 192 (1956)	16
Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965)	9

STATUTES

5 U.S.C. § 551(b)	15
Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-962, 83 Stat. 1290, 93 Stat. 695, *as amended*	3
§ 811	4
§ 811(a)	4, 5, 7
§ 811(d)	4
§ 813(a)	3
§ 813(b)	3
§ 813(c)	3
§ 813(e)	3
§ 813(f)	3, 5, 8, 9
§ 813(h)	3
§ 813(j)	3
§ 815	3
§ 818(a)	5
§ 820(j)	5
§ 960	4

FEDERAL REGULATIONS

30 C.F.R. Part 40	3

REGULATORY PROCEEDINGS

Kaiser Coal Corp. v. Secretary of Labor, 10 FMSHRC 1165 (1988)	3
Kerr-McGee Coal Corp. v. Secretary of Labor, 13 FMSHRC 1889, 1898 (ALJ 1991)	14
Kerr-McGee Coal Corp. v. Secretary of Labor, 15 FMSHRC 352 (1993) (review pending No. 93-1250, D.C. Cir.)	11, 12
Medicine Bow Coal Co. v. Secretary of Labor, 12 FMSHRC 904 (1990)	13
Secretary of Labor v. Wyoming Fuel Co., 14 FMSHRC 1282, 1286-87 (1992)	13

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

The Government's argument hinges on three fundamental errors.

First, the Government argues that pre-enforcement review is not available here because Congress channelled all disputes regarding MSHA regulations to the Review Commission. We demonstrate below that this is simply not true. The Congressionally-specified procedures cited by the Government relate solely to an enforcement action initiated by MSHA citation. The Mine Act is silent on the type of review available to aggrieved persons seeking relief from MSHA regulatory decisions approving representatives of miners. The Government's basic argument—that Congress' specification of the method to adjudicate MSHA-initiated *enforcement* proceedings necessarily implies an intent to preclude a mine operator-initiated *pre-enforcement* review of a regulatory decision—cannot be squared with *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), which held that the authorization of review for one type of regulatory action in a statute does not imply a Congressional intent to exclude review for an entirely different type of action. The Government has failed to show a clear Congressional intent to preclude pre-enforcement review here.

Second, the Government errs in asserting that this case is nothing more than a "garden-variety" dispute falling within the mine safety expertise of the Review Commission (R.Br. 15, 28). This case concerns much more than a dispute under the Mine Act, for the heart of the controversy is whether an important right recognized under the federal labor laws for almost 40 years can be obliterated by MSHA's interpretative gloss. The Review Commission's mine safety expertise and fact-finding ability have no bearing on the purely legal question raised by this statutory conflict. But what makes this case clearly beyond any garden-variety characterization is MSHA's coercive

power to assess daily penalties to force Petitioner's abandonment of its labor law right prior to the institution of any administrative hearing. The assessment of daily penalties, in the context of a purely legal issue concerning conduct which poses no present threat to the health or safety of Petitioner's employees, is a fundamentally unfair abuse of the penalty power and certainly beyond "garden-variety" conduct for an enforcing agency of the federal government.

Third, contrary to the Government's scare tactics, allowing pre-enforcement review in this case will not hamper the effective enforcement of the Mine Act, and will not permit routine evasion of MSHA enforcement simply by filing an anticipatory suit. This case falls within a narrow range for pre-enforcement review permitted by the Mine Act and this Court's finality, ripeness and exhaustion doctrines.

I. THE GOVERNMENT HAS FAILED TO ESTABLISH THAT CONGRESS INTENDED TO PRECLUDE PRE-ENFORCEMENT REVIEW.

The Government's entire jurisdictional argument rests on the assertion that the Mine Act contains a "comprehensive" review scheme that "channels" all challenges to MSHA actions to the Review Commission and then the courts of appeals (R.Br. 16-17). From this assumption, the Government argues that this case falls into the general principle that "the review process created by statute for a category of controversies is exclusive and does not permit district courts to exercise jurisdiction over the same controversies" (R.Br. 18). Petitioner does not take issue with this general principle, but it is demonstrably inapplicable here because the Mine Act plainly treats the category of mine-operator challenges to MSHA regulatory action differently from the category of MSHA-initiated enforcement actions, and directs only the latter to the Review Commission.

1. The Mine Act does not specify the method for review of the specific MSHA regulatory decision at issue here. The Act authorizes MSHA to promulgate "regulations" governing the designation of "representative of miners" (30 U.S.C. § 813(f) (1988 & Supp. III 1991)) (hereinafter "Section 813(f) regulations"), but the Act is silent as to the method of direct review for MSHA's Section 813(f) regulatory decisions—here, MSHA's action approving the designation of UMWA organizers, who were not employees of Petitioner, as "representatives of miners" under Section 813(f) ("MSHA's UMWA Designation").[1]

The Government offers no specific statutory authority proscribing pre-enforcement review of MSHA's Section 813(f) regulatory decisions, and no specific provision directing that only the Review Commission can hear challenges to those decisions. Instead, the Government relies on 30 U.S.C. § 815, which on its face only authorizes the Review Commission to hear enforcement actions initiated by MSHA. The Review Commission has consistently viewed its jurisdiction as delimited by this statutory provision and has held that it does not have jurisdiction, in the absence of a pending MSHA enforcement action, to give mine operators even a declaratory ruling on a dispute with MSHA.[2] Thus, neither the Mine Act nor the decisions of the Review Commission support the Government's contention that all controversies regarding MSHA's regulatory decisions concerning "representatives of miners" must be brought to the Review Commission.

The limited jurisdiction of the Review Commission is confirmed by the rest of the Mine Act. The Act does not authorize the Review Commission to review MSHA regulations and guidelines issued under 30 U.S.C. §§ 813(a) and (c) or actions taken or required under 30 U.S.C. §§ 813(b), (e), (h) or (j). Objection to these regulatory decisions is made in district court. *See Society of*

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[1] As discussed *infra* at 15-17, MSHA's UMWA Designation constitutes final agency action applying MSHA's interpretation of its Section 813(f) regulations (30 C.F.R. Part 40) to Petitioner.

[2] *See Kaiser Coal Corp. v. Secretary of Labor*, 10 FMSHRC 1165 (1988), and cases cited by the Government (R.Br. 34 n.21).

Professional Journalists v. Secretary of Labor, 616 F. Supp. 569 (D. Utah 1985), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987); *International Union, UMWA v. Martin*, 785 F. Supp. 1025 (D.D.C. 1992).

Moreover, Congress expressly precluded the Review Commission from any role in the development and determination of the appropriateness of the most important regulations under the Act. In 30 U.S.C. § 811, Congress authorized the Secretary to promulgate "Mandatory Safety and Health Standards" (hereinafter "Section 811(a) regulations") but gave aggrieved persons a limited period for pre-enforcement review of Section 811(a) regulations in the court of appeals with no involvement whatsoever by the Review Commission.[3] The Review Commission is even precluded from reviewing the validity of Section 811(a) regulations when MSHA brings actions before it on citations to enforce these regulations. *See* 30 U.S.C. § 811(d). Thus, the structure of the Mine Act belies the Government's argument that Congress intended to "centralize" all disputes over MSHA regulations in the Review Commission (Br. 22, 23 n.12).

Further, in Section 811(a) Congress clearly distinguished between pre-enforcement challenges to MSHA's regulations and MSHA-initiated enforcement actions. Since Congress codified procedures for pre-enforcement review of Section 811(a) regulations separate from MSHA enforcement actions, there is no basis to the Government's contention that separate pre-enforcement review of MSHA's regulatory decisions under Section 813(f) are precluded merely because Congress specified a forum for adjudicating MSHA citations.[4]

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[3] Recognizing the pre-enforcement nature of this direct review, Congress specified that no court could issue a preliminary injunction restraining enforcement of the mandatory standards during the review of the standards on the merits. 30 U.S.C. § 960.

[4] The special pre-enforcement review limitations on "Mandatory Safety and Health Standards" promulgated pursuant to Section 811(a) are limited to that Section and do not apply to other MSHA regulations, including MSHA's regulations promulgated pursuant to Section 813(f). The presence of an explicit pre-enforcement review procedure for Section 811(a) regulations does not imply that Congress, by its silence, intended that pre-enforcement review is unavailable for Section 813(f) regulations. *Abbott* specifically rejected a similar contention (387 U.S. at 141).

Nor does the Government's reliance (Br. 20) on 30 U.S.C. §§ 818(a) and 820(j), provide any basis for concluding that Congress intended to exclude pre-enforcement review. Both of these sections provide district court jurisdiction for suits brought by MSHA to enforce its orders and to collect civil penalties and are manifestly ancillary to MSHA enforcement actions. They therefore are irrelevant to the issue presented here, once the distinction between pre-enforcement review and enforcement action is recognized.

2. The Government's argument that the Mine Act's scheme for reviewing MSHA enforcement actions inherently precludes pre-enforcement challenges brought by aggrieved mine operators is flatly inconsistent with *Abbott*, which formulated the principles of judicial review of administrative action that continue to guide this Court. *See Reno v. Catholic Social Serv., Inc.*, —— U.S. ——, 61 U.S.L.W. 4652, 4656 (U.S. June 18, 1993). *Abbott* found the presumption for judicial review of agency action required a showing of "clear and convincing evidence" of Congressional intent to withhold pre-enforcement review (387 U.S. at 140 n.2). *Abbott* emphasized that (*id.*):

> The mere failure to provide specifically by statute for judicial review is certainly no evidence of an intent to withhold review.

Further, *Abbott* teaches that the provision for judicial review for one type of regulatory action does not necessarily imply an intent to withhold judicial review for another type (387 U.S. at 141-44).

Abbott clearly governs. In *Abbott*, as here, (1) the statute provided explicit procedures for agency enforce-

ment of its regulations, (2) the statute failed to make any provision for direct review of the regulations prior to agency enforcement actions, and (3) the regulated parties could have raised the same objections to the regulations in opposing the enforcement action as they sought to raise through direct pre-enforcement review.[5] Thus, it is clear from *Abbott* that the fact that the Mine Act contains specific *enforcement* procedures does not in itself create any inference that Congress intended thereby to eliminate pre-enforcement review.

3. The legislative history relied upon by the Government also does not evidence an intent to preclude pre-enforcement review. The Government relies exclusively on the decision by Congress to place the review of MSHA enforcement actions solely in the Review Commission and to eliminate duplicative *de novo* civil penalty actions in the district court (Br. 22-23). These changes, however, concern only the elimination of wasteful duplication and the achievement of improved efficiency in enforcement actions, and do not demonstrate a Congressional intention to otherwise divest district court jurisdiction.[6] Indeed, the precision in the Congressional language eliminating this jurisdiction demonstrates just the opposite—a general Congressional assumption, consistent with *Abbott,* that district courts have general plenary jurisdiction to review agency action unless Congress specifies to the contrary.[7]

Nor does the Government refute the legislative history support for pre-enforcement review referenced in Peti-

[5] In *Abbott*, as here, the ability of regulated parties to obtain meaningful review of the regulatory action in an enforcement proceeding was deemed to be inadequate because of the risk of penalties that would accrue if the agency action were ultimately upheld as lawful. The similar review inadequacy facing Petitioner was set forth in Pet. Br. 39-40 and is addressed at 10-15 *infra.*

[6] Petitioner's opening brief quoted passages from the legislative history explaining that this change was made for reasons wholly unrelated to any intent to restrict access to the general jurisdiction of federal courts (Pet. Br. 23 n.22).

tioner's opening brief. We showed there (Pet. Br. 22-23) that Congress incorporated Coal Act language into the Mine Act with the specific awareness that the language had been construed to permit pre-enforcement review in *Bituminous Coal Operators' Ass'n v. Secretary of Interior,* 547 F.2d 240 (4th Cir. 1977) ("*BCOA*"). The Government argues (Br. 23-24) that the *BCOA* decision was merely the ruling of a single court of appeals and therefore did not constitute "settled law" at the time the Mine Act was passed. The Government's argument is wrong on several grounds.

First, the "settled law" at the time of the passage of the Mine Act was *Abbott,* which plainly held that district courts could hear pre-enforcement challenges to agency action. The *BCOA* decision merely applied the principles of *Abbott* to the Coal Act. *Second, BCOA* was not an obscure appellate decision that was not noticed by Congress when it was re-writing the Coal Act to produce the Mine Act. Instead, the legislative history makes clear that *BCOA* was in the forefront of the legislative vision during the passage of the Mine Act (Pet. Br. 22-23). Moreover, the direct holding of *BCOA* concerns pre-enforcement review; it is not a minor point in the opinion subject to having been overlooked. *Third,* as discussed above, the Mine Act clearly envisioned pre-enforcement review of Section 811(a) regulations—thereby demonstrating a legislative ratification of *Abbott* and *BCOA.* Accordingly, the sole and unpersuasive legislative history argument made by the Government—*i.e.,* the elimination of duplicative and inefficient *de novo* civil penalty trials in district court—hardly qualifies as sufficient support for an affirmative Congressional intent to overrule *BCOA*

[7] Congress clearly knows how to write statutes to exclude or limit pre-enforcement review. When Congress withdraws jurisdiction the Court has taken the terms of the withdrawal on their face and has been loath to expand the exclusion to areas not specified. *See, e.g., Traynor v. Turnage,* 485 U.S. 535 (1988); *McNary v. Haitian Refugee Ctr., Inc.,* 498 U.S. 479 (1991).

sub silentio and preclude pre-enforcement review of MSHA's regulatory decisions under Section 813(f).

4. The Government relies heavily on *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984), to support its argument that Congress intended to preclude district court review. *Block*, however, fully supports Petitioner's position. There, the Court recognized (*id.* at 349) that "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." [8] In contrast, here Congress has not specified any mechanism for review of Section 813(f) regulatory decisions, and there is no evidence elsewhere in the Act or legislative history indicating an intent to preclude pre-enforcement review. These considerations establish, at a minimum, "substantial doubt" as to a legislative intention to preclude pre-enforcement review and therefore require application of the presumption favoring judicial review. *Block*, 467 U.S. at 351.[9]

The remaining cases relied on by the Government stand for the unremarkable proposition that an aggrieved party

[8] In *Block*, the ultimate consumers of milk sought to review a milk marketing order, even though the Agricultural Marketing Agreement Act included review of marketing orders only by "first handlers," who were directly regulated by the Act. Finding from the structure of the Act that Congress intended to permit only first handlers to participate in the formation of marketing orders, the Court concluded that Congress intended to limit the availability of judicial review to first handlers (467 U.S. at 348, 352-53).

[9] In contrast, in *United States v. Erika, Inc.*, 456 U.S. 201 (1982), the failure to provide for judicial review was conspicuous and supported by ample legislative history. In *Erika*, Congress had provided for judicial review of awards under Part A of the Medicare Program, but not for awards under Part B. The Senate Report demonstrated that the silence was deliberate and that review of Part B awards was not desired. Thus, the disparity in the treatment of the two categories of claims, and the specific language in the Senate Report explaining the disparity, demonstrated a clear, affirmative Congressional intent to exclude review.

may not avoid the prescribed statutory procedures for administrative and judicial review. In each case, an aggrieved party sought to initiate review of agency action and failed to comply with a precise statutory scheme permitting, or limiting, that type of review.[10] Significantly, none of those cases addressed the circumstances presented here—where Congress provided a specific method of *enforcement* of agency regulations by agency-initiated proceedings, but Congress was silent on the question of *pre-enforcement review*.[11] On the precise question raised by this case, *Abbott* and its progeny remain the only direct precedent.

II. THE DISTRICT COURT ALSO HAS JURISDICTION OVER PETITIONER'S CLAIMS DUE TO THE INADEQUACY OF MEANINGFUL REVIEW UNDER THE MINE ACT.

Even if all challenges to regulatory decisions under Section 813(f) were required to be presented to the Review Comission, the district court properly exercised jurisdiction of Petitioner's claims in the circumstances of this case. Petitioner's opening brief detailed the Hobson's

[10] *See, e.g., Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965) (attempt to circumvent specific procedure applicable to approval of formation of a new bank); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958) (attempted attack in a state court to a Federal Power Commission order where federal court of appeals had exclusive review under statute); *Board of Governors v. MCorp. Fin., Inc.*, —— U.S. ——, 112 S.Ct. 459 (1991) (plain language of the judicial review provisions of the Federal Institutions Supervisory Act deprived the district court of jurisdiction to enjoin the agency's proceedings).

[11] *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), and *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), do not deal with pre-enforcement review of a final regulatory decision, but rather concern challenges to the agency's determination that probable cause exists to bring an enforcement action—an issue that is bound up in the enforcement proceeding itself. Significantly, the court in *Abbott* discussed *Ewing* and did not find it inconsistent with pre-enforcement review (387 U.S. at 146-48).

choice Petitioner would face upon receiving MSHA's citation for failing to honor MSHA's UMWA Designation (Br. 30-36). In essence, Petitioner could not obtain review of its NLRA-conflict claim before the Review Commission without first refusing to comply with MSHA's UMWA Designation and receiving a citation.[12] Once this enforcement process has begun, however, Petitioner will be pressured into relinquishing its NLRA right because the Mine Act requires prompt abatement of violations and payment of penalties, including substantial daily penalties, for failure to abate within the time ordered by MSHA. Further, while abatement of the violation (*i.e.*, Petitioner's abandonment of its NLRA right) during the administrative proceedings would avoid increasing penalties, it would cause Petitioner to suffer irreparable harm during the proceedings because the UMWA would be able to use its enhanced position to bolster its ongoing union organizing activities—an advantage that could not be eliminated even if Petitioner ultimately prevailed on the merits of its statutory conflict claim after months of administrative and court review. In these circumstances, where Petitioner would be deprived a "meaningful" opportunity to obtain effective review of its substantial statutory and constitutional claims, the courts have held that Congress did not intend to deny all effective review, and have found jurisdiction in the district courts for the limited circumstances. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991); *Reno v. Catholic Social Serv., Inc.*, —— U.S. ——, 61 U.S.L.W. 4652 (U.S. June 18, 1993); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Traynor v. Turnage*, 485 U.S. 535 (1988).

The Government offers three main arguments in opposition: (1) the Review Commission is capable of handling these statutory and constitutional claims in the

[12] As noted *supra*, n.2, the Review Commission will not hear disputes prior to initiation of a MSHA enforcement action.

first instance; (2) any alleged coercion from threatened daily penalties is speculative; and (3) Petitioner will not suffer irreparable harm. The Government's arguments do not withstand scrutiny.

1. The Government goes to great length to demonstrate the expertise of the Review Commission in dealing with the Mine Act, and particularly with issues interpreting MSHA regulations (Br. 29-35). These arguments, however, miss the essential point. The issue here arises as a statutory conflict between the Mine Act and the NLRA. The NLRA right at issue has been recognized for almost 40 years as a part of the "accommodation" effected between the organizing rights of employees and employers under the labor laws. *Lechmere, Inc. v. NLRB*, —— U.S. ——, 112 S.Ct. 841 (1992). Although the Review Commission has undoubted expertise in mine safety issues, it has none in the areas of industrial relations and labor law. It should be expected to have difficulty in accommodating NLRA rights because, like other agencies, it has no "special expertise" to assess MSHA regulations in light of statutory considerations outside its "exclusive domain." *Traynor*, 485 U.S. at 544. The Review Commission demonstrated this point in its recent decision on the same legal issue presented here, where in an enforcement context it concluded that a mine operator's NLRA right was inapplicable to Mine Act considerations and referred the mine operator to the NLRB for resolution of its NLRA rights—an inapt solution since the NLRB has no regulatory authority over and no procedure to permit a challenge to MSHA's abrogation of the NLRA right. *Kerr-McGee Coal Corp. v. Secretary of Labor*, 15 FMSHRC 352 (1993) (review pending No. 93-1250, D.C. Cir.). In the circumstance here, where the claim is that the regulatory decision is inconsistent not "with the statute under which it was issued" but with another statute outside the agency's "exclusive domain," the federal courts are more appropriate to "decide whether there is

some fundamental inconsistency" in the agency's determination. *Traynor*, 485 U.S. at 544.[13]

2. The Government suggests that the possibility that MSHA would assess substantial penalties, including maximum daily penalties, against Petitioner was merely "hypothetical" (Br. 37 n.23). The record shows however that the threat of maximum daily penalties was successfully employed against the neighboring Kerr-McGee mine by the same MSHA office just a few months earlier on the identical issue (J.A. 42-43, 47-48).[14] The possibility that MSHA would engage in similar conduct against Petitioner was real and far from "hypothetical." *See Abbott*, 387 U.S. at 152-54 (threat of substantial penalties made agency enforcement proceeding an inadequate substitute for pre-enforcement review).

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[13] The *Kerr-McGee* decision is plainly inconsistent with the requirement imposed in *Traynor* that, in the context of competing statutory interests, it is the "duty of the courts, absent a clearly expressed Congressional intention to the contrary, to regard each as effective." 485 U.S. at 547-48 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). In the absence of any clear Congressional intention in the Mine Act to revoke the NLRA right (see Pet. Br. 26), the *Kerr-McGee* decision operates to violate the cardinal rule against "repeals by implication." *Traynor*, 485 U.S. at 547-48.

In this regard, it is significant that in contrast to the Review Commission's decision upholding MSHA's UMWA Designation for the Kerr-McGee mine, the district court in this case, after considering the merits of the statutory conflict claim, granted a permanent injunction on the basis of its finding that MSHA's UMWA Designation for Petitioner's mine exceeded MSHA's statutory authority under the Mine Act as construed in light of the NLRA. *Thunder Basin Coal Co. v. Martin*, No. 91-CV-0050-B (D.Wyo. March 13, 1992).

[14] The Government's effort to minimize the threat to Kerr-McGee (Br. 37 n.24) is belied by the Review Commission's characterization (*Kerr-McGee*, 15 FMSHRC at 355):

> Kerr-McGee finally abated the citation after receiving a letter from the MSHA district manager stating that Kerr-McGee would be assessed a daily penalty . . . if it did not immediately abate the violative condition.

MSHA's letter demanded abatement within 24 hours, and Kerr-McGee capitulated immediately (J.A. 42-44).

The Government also argues that MSHA's assessment of daily penalties is not coercive because the penalties can be minimized by using the Review Commission's expedited procedures, and because MSHA can only propose the penalties, which can then be imposed by the Commission with judicial review (R.Br. 37). The problem with these arguments is that they both depend entirely on Review Commission discretion, which will not be exercised until after MSHA initiates enforcement action. Expedited proceedings are disfavored, often opposed by MSHA, and vested to the sound discretion of the Review Commission ALJ.[15] Similarly, the Review Commission decisions offer little comfort regarding its potential ruling on daily penalties, for its decision in *Kerr-McGee* offered no criticism of MSHA's threat of maximum daily penalties in that case. In short, any mine operator, faced with the possibility of maximum daily penalties mounting during a multi-year enforcement proceeding, would be coerced, as was Kerr-McGee, into relinquishing its NLRA right.[16]

3. The Government and the UMWA as amicus curiae contend that Petitioner will suffer no irreparable harm from honoring the UMWA Designation during the administrative review process because there is no reason to believe that MSHA inspectors would allow non-employee miners' representatives to act outside the scope of their Mine Act responsibilities during an inspection and any individual act of abuse could be dealt with after the fact

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[15] *See, e.g., Secretary of Labor v. Wyoming Fuel Co.*, 14 FMSHRC 1282, 1286-87 (1992); *Medicine Bow Coal Co. v. Secretary of Labor*, 12 FMSHRC 904 (1990).

[16] MSHA's assessment of maximum daily penalties is particularly offensive in the circumstances here, where Petitioner has raised a legitimate legal question of statutory conflict and where the issue sought to be resolved by MSHA poses no present threat to the health or safety of Petitioner's employees. For this reason, the Government is wrong in contending that a claim of alleged inadequacy of Review Commission proceedings would be present in every MSHA enforcement case (R.Br. 38 n.25).

(R.Br. 39 n.26; UMWA Br. 18-19). This contention completely misses the mark, for it is the union's very presence on the premises and the attendant empowerment adhering to its "representative of miners" status that harms the employer. These advantages are not permitted under the labor laws and MSHA's grant of them under the guise of mine safety shifts the organizing balance in the union's favor.

The presence of union organizers on the employer's premises necessarily means that some personal contact with employees will occur that otherwise would not have been available. The designation also means that the union organizers will have access to the employers' reports and documents—safety plans, records, safety training, etc.—and access to MSHA reports and documents concerning the mine otherwise unavailable. In addition, the union would have the right to request inspections, participate in pre- and post-inspection conferences, block modification of regulations, challenge MSHA enforcement actions and participate in Review Commission proceedings on behalf of mine employees. This access would provide the union with apparent credibility to speak with knowledge about the employer's mine practices. In sum, the designation would give the union organizing advantages in terms of access, personal contact and knowledge that would not be available under the labor laws, as well as enhanced credibility flowing from the appearance of government imprimatur.[17]

Accordingly, contrary to the Government's superficial contention, Petitioner's rights under the NLRA were irreparably threatened by MSHA's conduct, and the Mine Act procedures would not permit adequate and meaning-

[17] These advantages were not lost on the UMWA when it adopted the designation of miner's representative as an "organizing 'tool'" as part of its overall organizing strategy. *Kerr-McGee Coal Corp. v. Secretary of Labor*, 13 FMSHRC 1889, 1898 (ALJ 1991). Nor were they lost on the federal district court in this case when it specifically referenced them in finding irreparable injury as part of its grant of the preliminary injunction (Pet. App. 28).

ful review. Under *Mathews, McNary, Traynor,* and similar cases cited above, Petitioner's statutory and due process claims were properly before the federal district court for determination.

III. PETITIONER STATED A COGNIZABLE CLAIM.

The Government asserts that even if the district court were not precluded from exercising jurisdiction in this case, it was nevertheless required to dismiss the complaint because MSHA had not yet taken "final agency action," the claim is not ripe for review, and Petitioner has not exhausted its available administrative remedies (Br. 41-48). None of these contentions has merit.

1. As the Government concedes (Br. 42), Section 10 of the APA provides a cognizable cause of action for relief from "final agency action."[18] MSHA's UMWA Designation is clearly "agency action."[19] Further, the Government does not take issue with Petitioner's review of the precedent applying the "pragmatic" test of finality set forth in *Abbott* and other cases of this Court, relied on in Petitioner's opening brief (at 38).[20] Instead, the Gov-

[18] Repeating its confusion between pre-enforcement review and review of MSHA enforcement actions, the Government contends (Br. 42) that the Mine Act specifies an administrative review process which the APA requires be followed. For the reasons discussed *supra*, the review process in the Mine Act applies only to MSHA-initiated enforcement actions, and therefore is not applicable to the pre-enforcement review sought by Petitioner.

[19] The APA defines "agency action" specifically to include interpretations of existing regulations. 5 U.S.C. § 551(b). The fact that MSHA's interpretational ruling was communicated to Petitioner in a letter written by MSHA's District Manager (J.A. 49-50) does not make the determination any less "agency action" under the APA. *See Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 437 (D.C. Cir. 1986) (letter from EPA Division head speaking for agency constituted final agency action for pre-enforcement review). Indeed, the Government recognizes (Br. 42) that the agency action challenged here is MSHA's UMWA Designation itself, rather than merely the letter that reported the agency's decision.

[20] Under this well established precedent, an agency decision is considered final for purposes of review under the APA when the

ernment only argues that MSHA's UMWA Designation is not "final" because MSHA has not yet issued a citation to enforce the Designation and that MSHA's interpretational ruling is subject to review by the Review Commission and the courts (Br. 42-43).

Actual enforcement by an agency is not required before the agency decision is "final" under the APA. In *Abbott*, the FDA's labelling regulations were deemed final for pre-enforcement review even though the FDA had not yet sought to enforce the regulations.[21] Similarly, in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 586 (1980), the Court observed that agency action is "final" when it constitutes the agency's final word on the matter "short of enforcement action." Accordingly, the actual issuance of a citation by MSHA—initiating an enforcement proceeding to sanction a mine operator for failure to comply immediately with the UMWA Designation—was not a prerequisite for finality.

Likewise, review of MSHA's regulatory decision by the Review Commission and the courts is not a condition for finality. The UMWA Designation was MSHA's unequivocal, public, and definitive interpretation of its regulation (J.A. 49-50), and MSHA regulations provided no further avenue for modification or reconsideration within the agency of MSHA's position. The Review Commission is a separate agency—characterized by the Government (Br. 47) as an "independent" body—that reviews objections to enforcement actions; it does not participate in MSHA's internal decisions and, apart from its rulings on the issues presented in enforcement actions, the Review Commission

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agency publicly articulates an unequivocal position and expects regulated entities to alter their behavior to comply with the directive. *See Darby v. Cisneros*, —— U.S. ——, 61 U.S.L.W. 4679, 4682 n.10 (U.S. June 21, 1993) (agency action which is "finally operative and decisive is reviewable" under the APA). For the reasons set forth in Petitioner's opening brief (at 38), MSHA's interpretational ruling meets all of these requirements.

[21] To the same effect are *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407 (1942); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

cannot dictate MSHA policies. The fact that agency action is ultimately subject to independent judicial or quasi-judicial review does not impair its finality for purposes of the APA: that a court would ultimately review the FDA's regulations in an enforcement proceeding did not make the regulations non-final for purposes of pre-enforcement review in *Abbott*.[22]

2. MSHA's regulatory decision is also "ripe" for judicial review. *First*, contrary to the Government's contention (Br. 44), the underlying legal question raised by Petitioner's complaint—the statutory authority for MSHA's UMWA Designation and the statutory conflict with the NLRA—is no different from the challenges to the statutory authority for the FDA's labelling regulation in *Abbott*, and other cases. *See Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 163 (1967) (petitioners framed a "purely legal issue" when they asserted that the challenged regulation was totally beyond the agency's power under the statute). For the reasons stated *supra* 11-12, the Review Commission's expertise on mine safety and health issues is simply not relevant to the purely legal question presented here.

Second, MSHA's UMWA Designation has the type of immediate and substantial impact on Petitioner that meets the second part of the ripeness test. *Reno v. Catholic Social Serv., Inc.*, —— U.S. ——, 61 U.S.L.W. at 4656 (applying the ripeness test delineated in *Abbott*). Here, MSHA made it clear that it expected Petitioner to comply immediately and post on the mine bulletin board its recognition of the UMWA as miners' representative and MSHA was prepared to follow up with an enforcement action

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[22] Pre-enforcement challenge to a MSHA Section 813(f) regulatory decision is, therefore, far different from challenging the internal administrative complaint and hearing by the Federal Trade Commission in *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-43 (1980), which held that an FTC administrative complaint was not "final action" in view of the fact that the agency itself would have an opportunity to review the matter again after the hearing before an ALJ and the court emphasized that the issuance of an FTC complaint does not require immediate compliance by the respondent.

(J.A. 48-50) that carried the probability of daily penalties for failing promptly to abate the cited violation, just as MSHA did in connection with the identical issue at the neighboring Kerr-McGee mine (J.A. 42-43).[23]

In arguing that the UMWA Designation would not impose a substantial burden on Petitioner, the Government (Br. 45) and the UMWA (Br. 16-17) fail to recognize the practical impact on Petitioner and its operations. As discussed at 10-15 above, Petitioner would be deprived of a legal right, required to affirm to its employees a recognition of the UMWA and forced into a dramatic deviation from Petitioner's ordinary business conduct. It gives to the union and its professional organizers an inherent advantage in seeking to unionize the mine—an advantage that thereby skews the delicate balance established in the NLRA—and thereby threatens significant change in Petitioner's business practices, perhaps even leading to a successful UMWA organizing campaign.[24]

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[23] In *Catholic Social Serv., Inc., supra*, the Court held that certain regulations were not ripe for judicial review because they merely limited access to a benefit (immigration status), did not impose sanctions for violation, and did not operate immediately and directly on certain of the claimants. Here, unlike *Catholic Social Serv.*, MSHA expected immediate compliance with its UMWA Designation and was prepared to enforce it with sanctions for non-compliance. These unassailable facts distinguish this case from *Catholic Social Serv.*, and place this case squarely on the *Abbott* "side of the line." 61 U.S.L.W. at 4656.

Toilet Goods Ass'n v. Gardner, supra, is also readily distinguishable. There, an FDA rule stated that the agency "may" under certain circumstances order an inspection of petitioners' facilities, and if access is refused, the agency "may" suspend further certification of color additives until the refusal is lifted (387 U.S. at 163). The Court, applying the standards set forth in *Abbott*, concluded that the regulation only stated possible agency action in the future and, therefore, was too remote from petitioner's everyday business affairs (387 U.S. at 164-65). Here, in contrast, there is no question that MSHA has applied its UMWA Designation directly to Petitioner, will demand compliance, and that compliance will directly affect Petitioner's conduct of its business.

[24] The UMWA's amicus brief suggests (Br. 16) that it may be difficult for UMWA employees to exercise the right they seek in

3. The short answer to the Government's claim (Br. 46-47) that Petitioner must further exhaust administrative remedies is that there are clearly none left to exhaust. The Government does not suggest that proceedings within MSHA are still available to change the UMWA Designation. The Government, continuing to confuse pre-enforcement review with MSHA-initiated enforcement actions, argues that Petitioner must first present its claims to the Review Commission before proceeding to court (Br. 47).

In *Darby v. Cisneros,* —— U.S. ——, 61 U.S.L.W. 4679 (U.S. June 21, 1993), the Court held that Section 10(c) of the APA required only exhaustion of statutorily-mandated "intra-agency" review, and that the courts were not free to require the exhaustion of optional appeals as well (61 U.S.L.W. at 4682). An adjudicatory proceeding before the Review Commission is plainly not intra-agency review, but, as the Government concedes, review by an "independent," "quasi-judicial agency" with "no enforcement responsibilities" (Br. 47). Further, Petitioner cannot exhaust the Review Commission remedy because, as discussed *supra*, mine operators have no right to initiate Review Commission proceedings to obtain a declaratory ruling on the lawfulness of MSHA regulatory decisions. Accordingly, because all intra-agency MSHA reviews have been completed, and no further proceedings outside of MSHA are required, the exhaustion requirement of Section 10(c) has been met. *Darby v. Cisneros, supra.*[25]

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participating in the MSHA inspections because inspections are unannounced and as non-employees they may not be present when inspections occur. But this disclaimer only demonstrates the real purpose of the union is not mine safety but rather to use the enhanced status of miners' representative and increased contact with miners from its activities as miners' representative to aid the UMWA in its ongoing organizing campaign. Indeed, as noted in n.17, the UMWA has for that reason included obtaining designations as miners' representatives as a vital "tool" in its organizing campaigns at Petitioner's and other mines.

[25] Contrary to the Government's alarmist arguments (Br. 20-21), pre-enforcement review will not impede the proper enforcement activities of MSHA or jeopardize mine safety. In rejecting the

CONCLUSION

The Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit should be reversed and remanded for consideration on the merits.

Respectfully submitted,

THOMAS F. LINN
ATLANTIC RICHFIELD COMPANY
555 17th Street, 20th Floor
Denver, Colorado 80202
(303) 293-4234

CHARLES W. NEWCOM
(Counsel of Record)
J. MARK BAIRD
SHERMAN & HOWARD
3000 First Interstate Tower North
633 Seventeenth Street
Denver, Colorado 80202
(303) 297-2900

WAYNE S. BISHOP
STEWART A. BLOCK
ACKERSON & BISHOP
1275 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20004
(202) 637-0319
Counsel for Petitioner

Date: August 5, 1993

Government's identical argument in *Abbott*, the Court declared that the district courts are fully capable of weighing the effect of preliminary injunctive relief on the public interest so that effective enforcement of the Food, Drug & Cosmetic Act would not be impaired (387 U.S. at 154-56). *See also Traynor v. Turnage*, 485 U.S. at 544 (refusing to assume that a multiplicity of suits will occur because of the availability of judicial review, and noting that the agency can seek the addition of preclusive language from Congress if necessary).

Moreover, the finality, ripeness and exhaustion doctrines will preclude pre-enforcement review in the "garden-variety" Mine Act case. In such cases, Congress has specified the mode of review of the agency's action through the Review Commission and the courts of appeals, thereby preventing diversion of enforcement actions to district court.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

THUNDER BASIN COAL COMPANY,
Petitioner,
v.
ROBERT B. REICH, SECRETARY OF LABOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN MINING CONGRESS AND NATIONAL COAL ASSOCIATION IN SUPPORT OF PETITIONER

Of Counsel:
EDWARD M. GREEN
MARK G. ELLIS
AMERICAN MINING CONGRESS
1920 N Street, N.W.
Washington, D.C. 20036

WILLIAM E. HYNAN
NATIONAL COAL ASSOCIATION
1130 17th Street, N.W.
Washington, D.C. 20036

TIMOTHY M. BIDDLE *
THOMAS C. MEANS
J. MICHAEL KLISE
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
Attorneys for Amici Curiae American Mining Congress and National Coal Association

* Counsel of Record

Dated: May 10, 1993

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QUESTION PRESENTED

Does the Federal Mine Safety and Health Act divest the district courts of subject-matter jurisdiction over pre-enforcement challenges to the application of the Secretary of Labor's regulations purporting to implement that Act, where the challenges pertain to constitutional issues, rights conferred by other statutes, or other matters outside the administrative expertise of the Federal Mine Safety and Health Review Commission?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
INTEREST OF *AMICI CURIAE*	1
STATEMENT	3
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. THE MINE ACT DOES NOT PRECLUDE PREENFORCEMENT JUDICIAL REVIEW OF MATTERS FALLING OUTSIDE THE SECRETARY'S AND THE COMMISSION'S ADMINISTRATIVE EXPERTISE	9
A. The Language And Legislative History Of The Mine Act Demonstrate That The Commission's Authority Is Not Plenary	9
B. The Commission's Decisions Confirm The Limits Of Its Jurisdiction And Authority	14
1. The Commission Has Held That the Mine Act's Specific Enforcement Provisions Narrowly Delineate the Scope of the Commission's Jurisdiction	14
2. The Commission Has Failed to Follow a Consistent, Predictable Policy Concerning the Adjudication of Questions of Statutory Conflict	17
3. The Commission Has Repeatedly Refused to Grant Requests for Preenforcement Declaratory Relief	19
II. THE PRECLUSION OF PREENFORCEMENT JUDICIAL REVIEW IN DISTRICT COURT CREATES A DANGER OF IRREPARABLE HARM	21

TABLE OF CONTENTS—Continued

Page

A. The Mine Act Requires Summary Abatement Of Alleged Violations 21

B. The Secretary's Regulations Construing Section 103(f) Of The Mine Act Threaten Operators' Rights Under Federal Labor Law.... 24

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Page

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 5, 9, 11

Beaver Creek Coal Co., 11 F.M.S.H.R.C. 2428 (1989) 20

Califano v. Sanders, 430 U.S. 99 (1977) 13

Climax Molybdenum Co., 2 F.M.S.H.R.C. 2748 (1980), *aff'd sub nom. Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447 (10th Cir. 1983) 19, 20, 22

Emery Mining Corp., 10 F.M.S.H.R.C. 276 (1988), *aff'd in part and rev'd in part on other grounds sub nom. Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990) 13, 17

Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) 26

Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964) 27

International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961) 26

International Union, UMWA v. MSHA, 823 F.2d 608 (D.C. Cir. 1987) 15

Kaiser Coal Corp., 10 F.M.S.H.R.C. 1165 (1988) 10, 14, 15, 16, 20

Kenny Richardson, 3 F.M.S.H.R.C. 8 (1981), *aff'd on other grounds sub nom. Richardson v. Secretary of Labor*, 689 F.2d 362 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983) 13, 14, 15

Kerr-McGee Coal Corp., 13 F.M.S.H.R.C. 1889 (ALJ 1991), *aff'd*, Nos. WEST 91-84-R *et al.*, 15 F.M.S.H.R.C. —— (1993), *petition for review docketed*, No. 93-1250 (D.C. Cir. Apr. 1, 1993) ..... *passim*

Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992) 6, 25

Leedom v. Kyne, 358 U.S. 184 (1958) 11

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 3

Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944) 26

TABLE OF AUTHORITIES—Continued

Page

Mid-Continent Resources, Inc., 10 F.M.S.H.R.C. 881 (ALJ 1988), *aff'd*, 12 F.M.S.H.R.C. 949 (1990) 13, 20, 26
NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) 25
Rohr Industries, Inc. v. Washington Metropolitan Area Transit Auth., 720 F.2d 1319 (D.C. Cir. 1983) 4
Rusk v. Cort, 369 U.S. 367 (1962) 9
Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. 180 (1978) 25
Thunder Basin Coal Co. v. Martin, 969 F.2d 970 (10th Cir. 1992) ..... *passim*
Thunder Basin Coal Co. v. Martin, No. 91-CV-0050-B (D. Wyo. Mar. 13, 1992) 6
Utah Power & Light Co. v. Secretary of Labor, 897 F.2d 447 (10th Cir. 1990) 4, 21, 23
Utah Power & Light Co., Mining Div., 13 F.M.S.H.R.C. 1617 (1991) 24

FEDERAL STATUTES

5 U.S.C. § 701 (1988) 9
5 U.S.C. § 702 (1988) 9
5 U.S.C. § 704 (1988) 9
29 U.S.C. § 152 (1988) 27
29 U.S.C. § 157 (1988) 27
29 U.S.C. § 158 (1988) 27
29 U.S.C. § 159 (1988) 26, 27
30 U.S.C. § 811 (1988) 12, 15, 25
30 U.S.C. § 813 (1988) 24
30 U.S.C. § 814 (1988) 21, 22
30 U.S.C. § 815 (1988) 10, 25
30 U.S.C. § 817 (1988) 10, 25
30 U.S.C. § 818 (1988) 5, 11
30 U.S.C. § 820 (1988 & Supp. III 1991) 5, 11, 21, 22, 24
30 U.S.C. § 821 (1988) 10, 25
30 U.S.C. § 823 (1988) 9, 14, 15, 16
30 U.S.C. § 957 (1988) 12
30 U.S.C. § 960 (1988) 5, 11

TABLE OF AUTHORITIES—Continued

Page

Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, § 3102, 104 Stat. 1388-29 22
Federal Coal Mine Health and Safety Act, Pub. L. 91-173, 83 Stat. 742 (1969) 12

FEDERAL REGULATIONS

29 C.F.R. Subpart B (1992) 25
29 C.F.R. § 2700.4 (1992) 25
29 C.F.R. § 2700.52 (1992) 23
30 C.F.R. Part 40 (1992) 15, 17, 24
30 C.F.R. § 40.1 (1992) 24
30 C.F.R. § 40.2 (1992) 24
30 C.F.R. § 48.3 (1992) 25
30 C.F.R. § 48.23 (1992) 25
30 C.F.R. § 75.220 (1992) 25
30 C.F.R. § 75.1203 (1992) 25

LEGISLATIVE MATERIALS

H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 2374 ..... 22, 23
S. Rep. No. 181, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401 10

MISCELLANEOUS

Louis L. Jaffe, *Judicial Control of Administrative Action* (1965) 11
National Labor Relations Board, *Casehandling Manual* (1983) 26
Supreme Court Rule 37 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-896

THUNDER BASIN COAL COMPANY,
Petitioner,

v.

ROBERT B. REICH, SECRETARY OF LABOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF *AMICI CURIAE* AMERICAN MINING CONGRESS AND NATIONAL COAL ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The American Mining Congress ("AMC") is an association of mining companies that produce most of the Nation's metals, coal, and industrial and agricultural minerals, as well as manufacturers of mining and mineral processing machinery, equipment, and supplies, and the engineering, contracting, and banking firms that serve the mining industry.

The National Coal Association ("NCA") is an association whose members constitute a substantial percentage of the Nation's coal-producing capacity, and includes companies that own and operate coal-mining facilities or

engage in businesses that are directly related to the production of coal, such as equipment manufacturers, coal sales companies, transporters, consultants, and resource developers.

AMC and NCA have a compelling interest in the availabiltiy of preenforcement judicial relief under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. §§ 801 *et seq.* (1988), and are adversely affected by the total foreclosure of such relief by the decision below. The Constitution and sound principles of administrative law and policy dictate that an entire industry cannot be totally cut off from judicial protection against agency injustice. Yet that would be the practical result of the decision below.

When, as in this case, an enforcement action by the Secretary would deprive an operator of rights arising outside the Mine Act, the specialized administrative relief available from the Federal Mine Safety and Health Reciew Commission ("Commission") is of no avail. In such cases—as, for example, when the Commission refuses to prevent the Mine Act from being used as a union "organizing tool" [1] in violation of mine operators' private property and National Labor Relations Act ("NLRA") rights—judicial review comes too late to provide meaningful protection of rights already infringed. In these instances, an operator must have access to the district courts for relief that the Commission cannot or will not provide. For these reasons, the court of appeals' decision denying preenforcement review should be reversed.[2]

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[1] *Kerr-McGee Coal Corp.*, 13 F.M.S.H.R.C. 1889, 1898 (ALJ 1991), *aff'd*, Nos. WEST 91-84-R *et al.*, 15 F.M.S.H.R.C. ——— (Mar. 4, 1993), *petition for review docketed*, No. 93-1250 (D.C. Cir. Apr. 1, 1993).

[2] Pursuant to Rule 37 of the Rules of the Court, the parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of the Court.

STATEMENT

Amici adopt Petitioner's Statement of the Case and seek to emphasize only a few points which will help to clarify the legal issues before the Court and the practical realities confronting the mining industry.

1. This case involves the extraordinary circumstance in which an administrative agency, in the course of carrying out its enforcement responsibilities under its organic statute, infringes on fundamental rights that exist independent of that statute. Regulation by its nature diminishes a regulated party's preexisting rights, but this Court has long recognized that regulation cannot extinguish all such rights in our constitutional system, lest the Constitution itself become a nullity.[3] Nor do subsequent legislative enactments extinguish rights conferred by earlier ones. Rather, absent specific direction from Congress, the statutes coexist, and harmonizing them and declaring "what the law is" is, "emphatically, the province and duty" of the courts.[4] The court of appeals in this case implicitly acknowledged the primacy of judicial review. It stated that enforcement actions under the Mine Act provide adequate review of issues of constitutional rights and statutory conflict, precisely *because* review by a court of appeals is ultimately available. *Thunder Basin Coal Co. v. Martin*, 969 F.2d 970, 974 (10th Cir. 1992). But the court ignored critical limitations of that form of review when confronting rights arising outside the agency's area of administrative expertise, and also ignored the fact that in the time required to obtain judicial review in that

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[3] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) ("If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply").

[4] *Id.* at 177.

fashion,[5] an operator's rights under the Constitution and other statutes can be irreparably harmed.

2. When the government attempts to regulate in areas requiring specialized expertise, such as mine safety and health, the potential for an administrative agency to exceed its lawful bounds under the guise of administrative deference is great. Thus, courts must be wary of rewarding, by deference, the very impropriety alleged.[6] The decision below demonstrates the point. The court correctly pinpointed why Petitioner's challenges were outside the Commission's and the Secretary's respective spheres of administrative expertise when it acknowledged that: (1) the Commission and its ALJs "may not enjoy any special expertise enabling them to decide constitutional challenges to the Mine Act and construction of the Act with other laws"; and (2) the enforcement which Petitioner sought to enjoin involved a potential violation which "in

[5] Of the Commission's 32 reported decisions in 1992 that reached the merits of citations or orders issued by the Mine Safety and Health Administration ("MSHA") on identified dates, *no* decisions were issued within a year of the date of citation or order, and only 5 were issued within 2 years. Sixteen cases took from 2 to 3 years to reach a final Commission decision, 7 took from 3 to 4 years, and 4 took 4 years or longer. *See* F.M.S.H.R.C. Decisions, vol. 14 (1992). This trend has continued. Of particular interest here, a case involving an operator's challenge to a citation and order alleging the same type of violation that would be at issue here took over 28 months to reach a judicially reviewable Commission order. *See Kerr-McGee Coal Corp., supra* note 1 (citation and order issued October 25, 1990; Commission decision, March, 4, 1993; appeal pending).

Factoring in the time required for briefing and oral argument before a court of appeals prolongs judicial resolution even further. Another similar case took nearly 4 years to complete that process. *See Utah Power & Light Co. v. Secretary of Labor,* 897 F.2d 447, 448-49 (10th Cir. 1990) (citation issued April 15, 1986; Commission decision, March 29, 1988; court of appeals decision, February 26, 1990).

[6] *See Rohr Industries, Inc. v. Washington Metropolitan Area Transit Auth.,* 720 F.2d 1319, 1327 (D.C. Cir. 1983).

no way endangers the safety of its miners," which is the Secretary's area of expertise. 969 F.2d at 974, 975. Yet the court erroneously concluded that adjudication by the Commission nonetheless provided not only an "adequate," but also the "exclusive," remedy for Petitioner's non-Mine Act claims. *Id.* at 976.

3. The court erred in holding that preenforcement judicial review is unavailable because the Mine Act expressly grants the district courts subject-matter jurisdiction in only two provisions.[7] *See* 969 F.2d at 973. As this Court has recognized, merely because a statute expressly makes some acts judicially reviewable, it does not follow that Congress intended to exclude judicial review as to others. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967).

4. In seeking limited preenforcement judicial review of issues arising outside the Commission's and the Secretary's administrative expertise, the mining industry does not dispute that Congress sought to create a process for prompt adjudication of mine safety and health disputes. *See* 969 F.2d at 974. It does not follow, however, that Congress intended to strip the whole mining industry of the right to judicial protection of its fundamental rights, foreclosing all injunctive relief outside the administrative enforcement scheme. On the contrary, when the Mine Act does address the availability of injunctive relief, it precludes such relief only as to "interim mandatory health or safety standard[s]," not as to the type of agency action challenged here. Mine Act § 513, 30 U.S.C. § 960 (1988).

5. Similarly, this case does not implicate Congress' intention to provide a speedy response to newly manifested mine hazards or a meaningful deterrent to safety and

[7] *See* Mine Act §§ 108 (providing for Secretary to seek injunctive relief against operator in district court), 110(j) (Secretary may bring action to collect civil penalties in district court), 30 U.S.C. §§ 818, 820(j) (1988).

health violations through prompt enforcement action. Rather, this case involves prospective violations that would in no way endanger[] the safety of . . . miners." 969 F.2d at 975. Moreover, Petitioner sought relief from the district court through precisely the mechanism that would provide prompt, certain relief—an action for a preliminary injunction. The district court entered the injunction within 10 days after Petitioner filed suit [8]—a far cry from the months or years that it would take Petitioner to attain judicial review in an administrative enforcement proceeding.[9] Clearly, the statutory policy favoring speedy resolution of disputes was advanced, not undermined, by Petitioner's direct challenge in district court.

6. The undisputed facts in this case demonstrate a high potential for irreparable injury and present a compelling case for preenforcement judicial review. Without such review, nonunion operators could be required, under pain of citation, daily monetary penalties, and criminal liability, to admit a nonemployee union organizer onto company property, allow him to accompany a federal inspector on a thorough inspection of all areas of the operation, and give him access to voluminous information about the operator's business—thus forfeiting private property rights and rights under federal labor law that this Court reaffirmed just last Term.[10] No amount of relief months or years later, when a Mine Act enforcement proceeding finally reaches the stage of judicial review, can compensate for the unlawful advantage that a union would gain in an organizing campaign in the meantime, both from its organizer's wholesale access to company property and information and from the gain in his stature that would accompany his forced admission under

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[8] *See Thunder Basin Coal Co. v. Martin*, No. 91-CV-0050-B, slip op. at 3 (D. Wyo. Mar. 13, 1992).

[9] *See supra* note 5.

[10] *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992).

the Mine Act. Congress certainly never intended the Mine Act, *sub silentio*, to alter so radically the labor-management balance it fashioned under the NLRA.

SUMMARY OF ARGUMENT

Judicial review of administrative agency actions must be available unless clear and convincing evidence demonstrates that Congress intended to preclude it. There is no evidence that Congress intended to foreclose all preenforcement judicial review of the Secretary of Labor's actions under the Mine Act. On the contrary, the Commission's statutory expertise is limited to mine safety and health, and does not encompass legal issues arising outside that sphere. Although the Mine Act and its legislative history evince Congress' intent to grant the Commission primary jurisdiction over specified proceedings, Congress left intact a mining company's right to seek preenforcement relief in district court. By so doing, Congress recognized, contrary to the finding of the court below, that the Commission's jurisdiction was neither "exclusive" nor "adequate" to address every type of claim that a mine operator might raise, such as constitutional questions and claims involving statutory conflicts.

The Commission itself has acknowledged some limitations on its jurisdiction, but has wavered as to their nature and scope, causing significant uncertainty in the mining industry. Most recently, the Commission construed its jurisdiction narrowly, refusing to reach issues of statutory conflict; yet the court below banned Petitioner from the courthouse with the assurance that proceedings before the Commission were adequate to reach those very kinds of issues. Moreover, the Commission has repeatedly refused to grant mining companies declaratory relief from prospective enforcement actions, ruling that its ability to grant such relief is circumscribed by its specific grants of authority under the Mine Act. The net result of the Commission's vacillations and selectively

narrow view of its jurisdiction is that a company must first violate the law before it can learn what the law is.

A mere accusation of a violation—in the form of a citation or order issued by the Secretary—is enough under the Mine Act to cause irreparable harm to a mine operator, even if he successfully challenges the enforcement action in administrative proceedings before the Commission. The Mine Act requires rapid abatement of alleged violations even before they are adjudicated. A cited operator must either incur the costs of abatement, which can be substantial, or run the risk of further sanctions for failing to abate, including criminal sanctions and daily civil penalties of up to $5,000.

Abatement also carries nonmonetary costs, as this case illustrates. Abatement in this case would have required a nonunion operator to admit a union organizer onto company property for organizing purposes, in derogation of the operator's private property rights and other rights conferred by the NLRA. Such rights are beyond the Commission's expertise and therefore might escape review in an administrative proceeding. Furthermore, even if they were heard, they would not receive *judicial* review until months or even years later, long after the organizer's MSHA-compelled presence had altered the delicate labor-management balance that federal labor law seeks to preserve. To avert irreparable harm such as this, mining companies must be able to seek preenforcement relief in district court on matters outside the scope of the Commission's administrative expertise, and the court below erred in holding to the contrary.

ARGUMENT

I. THE MINE ACT DOES NOT PRECLUDE PREENFORCEMENT JUDICIAL REVIEW OF MATTERS FALLING OUTSIDE THE SECRETARY'S AND THE COMMISSION'S ADMINISTRATIVE EXPERTISE.

A. The Language And Legislative History Of The Mine Act Demonstrate That The Commission's Authority Is Not Plenary.

Access to courts is fundamental to our system of government. When an agency seeks to foreclose access to the courts, the question is not, as the court below assumed, whether the enabling statute authorizes judicial review, but whether the statute forbids it. A long line of decisions by this Court, buttressed by enactment of the Administrative Procedure Act, recognizes a presumption in favor of judicial review, which can be overcome only upon a showing of " 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories*, 378 U.S. at 140-41 (collecting cases; citing 5 U.S.C. §§ 701 (a), 702, 704; and quoting *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962)).

There is no evidence of a contrary legislative intent in the Mine Act. The primary adjudicative mechanism of the Act—administrative enforcement proceedings before the Commission, followed by judicial review of the Commission's decision in a federal court of appeals—is necessarily circumscribed by the jurisdictional authority conferred on the Commission by Congress. The Commission's members are chosen for their expertise in the subject of mine safety and health, not for general legal expertise. Mine Act § 113(a), 30 U.S.C. § 823(a) (1988).[11] Moreover, the causes of action over which the

[11] Section 113(a) of the Mine Act provides, in pertinent part:

> The Commission shall consist of five members, appointed by the President by and with the advice and consent of the Senate, *from among persons who by reason of training, education, or*

Commission can preside, although broad within the subject matter of mine safety and health, are limited to a few specific types of actions: contests of citations and orders issued by the Secretary; contests of related civil penalty proposals; applications for temporary relief from certain orders issued by the Secretary; contests of imminent danger orders of withdrawal; and discrimination complaints and compensation petitions filed by miners or by the Secretary on their behalf. Mine Act §§ 105(d), 105(b)(2), 107(e), 105(c), 111, 30 U.S.C. §§ 815(d), 815(b)(2), 817(e), 815(c), 821 (1988). These provisions, as the Commission itself has held, "delineate the scope of the Commission's jurisdiction." *Kaiser Coal Corp.*, 10 F.M.S.H.R.C. 1165, 1169 (1988).

The Mine Act's delineation of the Commission's jurisdiction leaves undisturbed a significant residuum within the jurisdiction of the district courts. Under the Act's plain language, the Commission's expertise does not reach legal issues arising outside the sphere of mine safety and health, such as questions of constitutional law (though the Commission has on occasion ventured into such areas, *see Thunder Basin*, 969 F.2d at 974 (noting Commission's past willingness to consider constitutional is-

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experience are qualified to carry out the functions of the Commission under this chapter.

30 U.S.C. § 823(a) (1988) (emphasis added). The legislative history further elaborated on the nature of the Commission's expertise:

> This qualification [in 30 U.S.C. § 823(a)] is not intended to limit the selection of members to technicians. It is the Committee's expectation that nontechnicians with the requisite administrative experience or persons whose qualifications are based upon either formal training or practical experience in mine safety and health or related matters would qualify for appointment.

S. Rep. No. 181, 95th Cong., 1st Sess. 47 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3447.

sues)).[12] Indeed, Congress itself expressly authorized jurisdiction in the district courts in §§ 108 and 110 of the Mine Act, 30 U.S.C. §§ 818, 820 (1988), a fact which confirms, contrary to the findings of the court below, that (1) the Commission's jurisdiction over mine safety and health is not exclusive,[13] and (2) permitting jurisdiction in the district courts does not *per se* "disrupt[] the review scheme Congress intended." [14] *See* 969 F.2d at 975-76.

Moreover, § 513 of the Mine Act, 30 U.S.C. § 960 (1988), confirms that access to district courts is a recognized part of, and not inimical to, the Mine Act's review scheme. Section 513 provides:

> In any proceeding in which the validity of any interim mandatory health or safety standard set forth

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[12] Moreover, as with any other agency, the Commission's jurisdiction does not extend to suits alleging that its own unlawful action has inflicted an injury for which the law, apart from the Commission's organic statute, affords a remedy. *See Leedom v. Kyne*, 358 U.S. 184, 188 (1958).

[13] The court below cited §§ 108 and 110 as raising a negative implication that Congress intended to confer jurisdiction in district court only in those two instances. 969 F.2d at 973. The court's inference, however, is invalid, as this Court has made clear:

> "The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. *The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.*"

Abbott Laboratories, 387 U.S. at 141 (quoting Louis L. Jaffe, *Judicial Control of Administrative Action* 357 (1965)) (emphasis added).

[14] The court below recited a lengthy portion of the legislative history reflecting Congress' disenchantment with delays in *de novo* district court trials on the merits of civil penalty determinations. 969 F.2d at 974 n.4. However accurate Congress' perception, it is not relevant to whether a district court can or should exercise jurisdiction in cases such as Petitioner's, which do not involve the adjudication of penalty determinations.

> in subchapter II and III of this chapter [30 U.S.C. §§ 841 *et seq.*, 861 *et seq.*] is in issue, no justice, judge, or court of the United States shall issue any temporary restraining order or preliminary injunction restraining the enforcement of such standard pending a determination of such issue on its merits.

This provision, which the court below never discussed despite claiming to account for the "*entire* legislative scheme," 969 F.2d at 972 (citations omitted; emphasis in original), sets forth the Mine Act's sole limitation on judicial injunctive relief.[15] As § 513 by its very presence demonstrates, Congress acknowledged the availability of suits for injunctive relief and barred them only to the extent stated in that provision: Congress precluded only temporary restraining orders and preliminary injunctions, and not permanent injunctions; and it precluded them only as to the Act's "interim mandatory health or safety standard[s]," leaving intact the parties' access to injunctive relief on other matters, such as the claims raised by Petitioner here.[16]

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[15] Congress enacted § 513 in 1969, as part of the Mine Act's predecessor, the Federal Coal Mine Health and Safety Act, Pub. L. 91-173, 83 Stat. 742 (1969), previously codified at 30 U.S.C. §§ 801 *et seq.* (1976) ("Coal Act"), and retained it without change in 1977 in the Mine Act.

[16] In the Coal Act and the Mine Act, Congress legislated detailed interim mandatory health and safety standards, which were to remain in effect unless or until superseded by "improved mandatory health or safety standards" promulgated by the Secretary pursuant to § 101(a) of the Mine Act, 30 U.S.C. § 811(a) (1988). The regulations at issue here, 30 C.F.R. Part 40 (1992), concerning the selection of a representative of miners, are twice removed from the preclusive effect of § 513. First, they are regulatory rather than statutory and thus do not fall within § 513's limitation to statutory standards only. Second, they are not health and safety standards at all. They were not issued under § 101(a), but rather under the Secretary's general authority to "issue such regulations as [he] deems appropriate to carry out any provision of this Act." 30 U.S.C. § 957 (1988).

Moreover, access to the district courts is vital because constitutional questions "obviously are unsuited to resolution in administrative hearing procedures," *Califano v. Sanders*, 430 U.S. 99, 109 (1977), and because operators have no assurance that the Commission or its ALJs would entertain arguments based on constitutional rights or statutory conflict. The Commission has occasionally been willing to consider such arguments. *See Emery Mining Corp.*, 10 F.M.S.H.R.C. 276, 290-92 (1988), *aff'd in part and rev'd in part on other grounds sub nom. Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990); *Kenny Richardson*, 3 F.M.S.H.R.C. 8 (1981), *aff'd on other grounds sub nom. Richardson v. Secretary of Labor*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). But there is a substantial difference between an adjudicative agency's occasional *willingness* to consider such issues, and a district court's *duty* to do so. Mine operators face substantial uncertainty because the Commission and its ALJs have invoked the Mine Act on other occasions to fence in their expertise and responsibility, enabling them to avoid reaching such issues. *See, e.g., Kerr-McGee Coal Corp., supra*, slip op. at 11 ("nothing in the Mine Act or general principles of administrative law requires that the Secretary or the Commission defer to or incorporate the NLRA"); *Mid-Continent Resources, Inc.*, 10 F.M.S.H.R.C. 881, 886 (ALJ 1988) ("it is the function of this judge to adjudicate issues under the Mine Act, not the Labor Management Act"), *aff'd*, 12 F.M.S.H.R.C. 949 (1990). The Commission's vacillations create an untenable situation for an operator seeking adjudication of an issue of statutory conflict, and pose a substantial threat that a record developed in proceedings before the Commission would be inadequate to permit judicial review by a court of appeals.

B. The Commission's Decisions Confirm The Limits Of Its Jurisdiction And Authority.

The limitations on the Commission's jurisdiction and authority are evident not only from the language and legislative history of the Mine Act, but from the Commission's own decisions. On occasion, the mining industry has sought relief before the Commission and its ALJs, only to be met with the response that the Commission lacks the jurisdiction, expertise, or authority to grant the relief requested. Since the contrary conclusion—that the Commission has demonstrated its willingness to consider such matters as constitutional challenges or questions of statutory conflict—is one of the underpinnings of the decision below, *see* 969 F.2d at 974, *Amici* believe that it is crucial for the Court to have an accurate understanding of the Commission's rulings in this area.

1. *The Commission Has Held That the Mine Act's Specific Enforcement Provisions Narrowly Delineate the Scope of the Commission's Jurisdiction.*

The two leading Commission decisions discussing the scope of that agency's jurisdiction are *Richardson, supra,* which the court of appeals took into account, and *Kaiser Coal Corp.*, 10 F.M.S.H.R.C. 1165 (1988), which the court ignored. In *Richardson,* the Commission held that it had the power to determine the constitutionality of a provision of the Mine Act. 3 F.M.S.H.R.C. at 18. The holding rested on § 113(d) of the Act, 30 U.S.C. § 823(d), which the Commission found gave it "primary adjudicative jurisdiction over disputes arising under the Act" and authorized it to "decide independently questions of fact, law and policy." 3 F.M.S.H.R.C. at 18. In so ruling, the Commission admittedly rejected the weight of judicial authority that adjudication of constitutionality is beyond the scope of administrative agencies. *See* 3 F.M.S.H.R.C. at 18.

This broad view contrasts sharply with the Commission's approach seven years later in *Kaiser Coal,* in which an operator sought declaratory judgment concerning the applicability of one of the Secretary's mandatory safety standards to certain of its mines. The Secretary had previously cited the operator for allegedly violating the standard, but the case subsequently settled. 10 F.M.S.H.R.C. at 1167-68. In the meantime, the operator had petitioned for modification of the standard.[17] The petition was granted, but implementation of the modification was blocked when the Part 40 miners' representative filed a request for a hearing and the proceedings were continued indefinitely.[18] *Id.* at 1168. The operator then applied to the Commission for a declaratory judgment that the standard was inapplicable.

The Commission held that it lacked jurisdiction, because the asserted basis for it, § 113(d) of the Mine Act, 30 U.S.C. § 823(d)—the same provision that the Commission had found *supported* jurisdiction in *Richardson*—

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[17] Section 101(c) of the Mine Act, 30 U.S.C. § 811(c) (1988), provides a variance procedure in which the Commission has no role.

[18] The Mine Act gives the representative of miners (which, at unionized coal mines, is usually the UMWA) a prominent role in petitions for modification, which is one reason why the selection of a miners' representative bears closer scrutiny than the Secretary, the Commission, and the Tenth Circuit have given it. Under § 101(c), the representative of miners is entitled to notice of the filing of an operator's petition for modification, can intervene in the administrative review proceedings, and can petition for modification of standards at the mine. Moreover, as a participant in the proceedings, the representative of miners can seek judicial review of the Secretary's ruling under § 101(d) and can effectively block relief for years despite the Secretary's willingness, based upon his own investigation, to grant it to the operator. *See International Union, UMWA v. MSHA,* 823 F.2d 608 (D.C. Cir. 1987) (vacating, at request of miners' representative, Secretary's grant of interim relief from operation of mandatory safety standard pending final decision on petition for modification).

is purely procedural and does not confer jurisdiction beyond the scope of the Commission's authority delineated elsewhere in the Act. The Commission explained that its jurisdiction was limited to a few specific types of actions: contests of citations and orders issued by the Secretary; contests of related civil penalty proposals; applications for temporary relief from certain orders issued by the Secretary; contests of imminent danger orders of withdrawal; and discrimination complaints and compensation petitions filed by miners or by the Secretary on their behalf. 10 F.M.S.H.R.C. at 1169. The Commission held that § 113(d)(1) "creates no specific right of action or proceeding over which the Commission may preside," and encompasses matters only "in those proceedings *otherwise* properly filed pursuant to the Act." 10 F.M.S.H.R.C. at 1169-70 (emphasis in original). The Commission concluded:

> This language [§ 113(d)(1)] must be read in the proper statutory context discussed above, and is not an invitation from Congress to legislate for ourselves virtually unlimited jurisdiction over "any proceeding."

10 F.M.S.H.R.C. at 1170.[19]

This decision belies the court of appeals' conclusion that, merely because the Commission has shown a willingness to entertain constitutional questions outside its sphere of expertise, an operator is precluded from seeking injunctive relief in district court. *See* 969 F.2d at 974. To reach that erroneous conclusion, the court had to rely on *Richardson* without accounting for the far narrower view of jurisdiction that the Commission subsequently adopted in *Kaiser Coal*. In *Richardson*, the Commission found that § 113(d) was the very source of

[19] With respect to the Commission's authority and expertise to decide constitutional questions, it should be noted that there is no requirement that members of the Commission be attorneys, and the current Chairman is not an attorney.

the agency's jurisdiction—a conclusion which, because it infused § 113(d) with substantive content, has been largely eroded, if not entirely overruled, by *Kaiser Coal*'s holding that § 113(d) is purely procedural.

2. *The Commission Has Failed to Follow a Consistent, Predictable Policy Concerning the Adjudication of Questions of Statutory Conflict.*

Over the years, the Commission has wavered between a willingness to entertain questions of statutory conflict and, more recently, an outright rejection of them, underscoring the substantial difference between an adjudicative agency's "willingness" to consider statutory conflict issues and a district court's duty to do so.

In *Emery Mining Corp., supra*, the Commission was willing to reach such questions. In that instance, the Secretary had cited the operator for refusing to admit a nonemployee union representative to mine property to accompany an MSHA inspector as a Part 40 representative of miners. The operator, relying on principles of private property law developed under the NLRA, argued *inter alia* that it could properly condition the admission of this nonemployee to mine property on the execution of a waiver of liability which the operator required of all outsiders. *See* 10 F.M.S.H.R.C. at 289-90. The Commission proceeded to "balanc[e] . . . the competing interests" of the Mine Act and the NLRA. It concluded that no violation of the Mine Act occurred, because, under the law developed under the NLRA, the "balance of legitimate competing interests tips in favor of" the operator, who had a legitimate and substantial interest in protecting against liability for injuries that outsiders might suffer at the mine site. *Id.* at 292.

The Commission's apparent willingness to address and resolve questions of statutory conflict in *Emery* evaporated entirely with its recent decision in *Kerr-McGee, supra*, where the operator sought a similar review of com-

peting statutory interests. This time, the Commission emphatically refused to conduct the analysis:

> Although we cannot ignore other statutes when interpreting the Mine Act, nothing in the Mine Act or general principles of administrative law requires that the Secretary or the Commission defer to or incorporate the NLRA. *Our proper field of judicial inquiry is the Mine Act* . . . . We agree with the Secretary that he is not required to integrate the NLRA's concepts of collective bargaining into his regulations implementing the Mine Act. *Nor is this Commission required to integrate NLRA concepts into its interpretation of the Mine Act.*

Kerr-McGee, slip op. at 11 (emphasis added; citations omitted). Given that the Commission, at the Secretary's behest, chose to limit its "field of judicial inquiry" to the Mine Act, the Secretary is in no position now to claim that the Commission's jurisdiction over matters outside that field is exclusive.

These circumstances underscore the very real dilemma that an operator faces in attempting to resolve questions of statutory conflict. He is told by the Tenth Circuit, at the urging of the Secretary, that he must utilize Commission proceedings as his exclusive remedy for such claims; yet when he goes to the Commission, he is told, again at the Secretary's urging, that the Commission lacks the expertise to address these questions and that he is still "in the wrong forum" and should go to the National Labor Relations Board ("NLRB"). *Kerr-McGee*, slip op. at 12. One can readily imagine the NLRB taking a correspondingly narrow view of its expertise, leaving the statutory conflict unresolved and the operator caught in a crossfire, vulnerable to MSHA enforcement if he turns one way and unfair labor practice charges if he turns the other.

3. *The Commission Has Repeatedly Refused to Grant Requests for Preenforcement Declaratory Relief.*

A further measure of an operator's need for recourse to a forum having general federal-question jurisdiction is the Commission's long-standing refusal to grant preenforcement declaratory relief to operators seeking to foreclose unlawful action by the Secretary, or even to assume jurisdiction over petitions for such relief. Although the ostensible reasons for the refusal vary, for all practical purposes declaratory relief, which might obviate an operator's resort to a district court in circumstances such as those presented here, is not available despite the Commision's repeated assurances that it is.

The myth of declaratory judgments in Commission proceedings stems from *Climax Molybdenum Co.*, 2 F.M.S.H.R.C. 2748 (1980), *aff'd sub nom. Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447 (10th Cir. 1983). In that case, the Secretary moved that the operator's challenge to dust control citations be dismissed as moot after the Secretary vacated the citations. The operator opposed the dismissal, seeking declaratory relief interpreting the standard to protect against future enforcement based on what the operator believed to be an erroneous interpretation. *See* 2 F.M.S.H.R.C. at 2748, 2750.

The Commission declined to issue declaratory relief, however, holding that the operator had not suffered economic harm, and noting that the Commission was "not yet convinced that our early resolution of these issues [through declaratory relief] is prudent." *Id.* at 2753. The Tenth Circuit affirmed, but with an unsettling conclusion:

> We recognize that in the case before us, there exists *considerable uncertainty* regarding the proper interpretation of the MSHA dust regulations. *We are sympathetic to the plight of industries that must structure their operations and make long-term capital*

> *investments in the face of this uncertain regulatory environment. Nevertheless, the scope of our review of the Commission's denial of declaratory relief is limited* to a determination of whether the Commission abused its discretion.

703 F.2d at 452 (emphasis added).[20]

In the years since *Climax Molybdenum*, the Commission has steadfastly declined to provide declaratory relief to operators, to the point of disclaiming jurisdiction over applications for declaratory relief outside a pending enforcement proceeding. *See Kaiser Coal, supra* (no jurisdiction over application for declaratory relief absent pending enforcement proceeding); *Beaver Creek Coal Co.*, 11 F.M.S.H.R.C. 2428 (1989) (declaratory relief denied; no present dispute between operator and Secretary, and no showing that Secretary will take enforcement action in future); *Mid-Continent Resources, Inc.*, 12 F.M.S.H.R.C. 949 (1990) (declaratory relief denied; case held moot because operator had failed to establish substantial likelihood of recurrence).

The history of the Commission's treatment of declaratory judgments illustrates the reality of seeking such relief in what the court below billed as the "exclusive" and "adequate" forum for challenging the legality of the Secretary's actions: applying for declaratory relief is futile. Therefore, operators must have access to the district courts or be foreclosed from declaratory relief altogether.

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[20] The result was particularly disturbing for the operator, who had spent $190,500 in a good-faith effort to ascertain the most feasible dust-control measures to implement at its mine to comply with the cited standard. *See* 2 F.M.S.H.R.C. at 2750 n.3. Moreover, the Tenth Circuit's deferential posture toward the Commission confirms the fallacy of that same Circuit's reasoning in the instant case that judicial review of enforcement actions is "adequate" to reach constitutional questions and other matters outside the Mine Act.

II. THE PRECLUSION OF PREENFORCEMENT JUDICIAL REVIEW IN DISTRICT COURT CREATES A DANGER OF IRREPARABLE HARM.

A. The Mine Act Requires Summary Abatement Of Alleged Violations.

Besides conflicting with Congress' intent to preserve access to the district courts except as to matters specifically within the Commission's areas of administrative expertise, the preclusion of preenforcement judicial review under the Mine Act creates a potential for irreparable harm to an operator who disagrees in good faith with the legality of an enforcement action by the Secretary. The court below perceived no problem, because, in its view, an operator who disobeys the Mine Act or regulations and incurs a citation or penalty "is only penalized if [he] loses on the merits of [his] claim." 969 F.2d at 975. By the time "any penalty is actually imposed," the court reasoned, the operator will have had a full and adequate hearing on the citation. *Id.*

But the court's analysis tells only half the story. The ultimate monetary penalty for an alleged violation is not the only cost that an operator may incur when cited for an alleged violation. The Mine Act also subjects him to a summary abatement requirement. Under § 104(a) of the Act, every citation must fix a "reasonable time for . . . abatement."[21] 30 U.S.C. § 814(a) (1988). An operator who fails to abate becomes subject to an order directing the withdrawal of all persons from the affected area of the mine, as well as to daily civil penalties of up to $5,000 until abatement occurs. 30 U.S.C. §§ 814(b), 820(b) (1988 & Supp. III 1991). In addition, opera-

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[21] Abatement periods under the Mine Act are often calculated in terms of minutes or hours rather than days. *See, e.g., Kerr-McGee*, 13 F.M.S.H.R.C. at 1889-90 ("failure to abate" order issued within 10-20 minutes of citation); *Utah Power & Light Co.*, 897 F.2d at 448-49 (citation gave operator 10 minutes to abate alleged violation).

tors are subject to orders requiring the shutdown of mining until abatement occurs. 30 U.S.C. § 814(d) (1988). Failure to comply with any order can lead to criminal penalties. 30 U.S.C. § 820(c), (d) (1988). Thus, the cost of abatement and the risks of a good-faith refusal to abate can be substantial,[22] yet without access to a district court, and with the Commission's intransigent refusal to grant declaratory relief, an operator who has reasonable grounds for questioning the legality of an enforcement action has no choice but to incur those costs or risk additional sanctions.

The court below gave such concerns short shrift. It did not address abatement costs at all. Moreover, although it conceded that the Secretary's threats of daily failure-to-abate penalties "in the face of a bona fide interpretive dispute are indeed troubling," it rationalized away that concern because, in its view, (1) the availability of an administrative hearing meant that such penalties "may be constitutionally valid," and (2) "[i]t seems questionable" that the Commission or a court of appeals would sustain a significant penalty in these circumstances. 969 F.2d at 976. These arguments, however, are pure speculation—particularly the latter one, which fails to account for Congress' amendment of the Mine Act in late 1990 to increase the daily penalty ceiling from $1,000 to $5,000 as a greater deterrent to violations.[23] Congress stated on that occasion that it "expect[ed] MSHA to assess significantly higher penalties across-the-

[22] *See, e.g., Climax Molybdenum, supra* (operator spent $190,500 attempting to achieve compliance with dust level standard).

[23] *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508, § 3102, 104 Stat. 1388-29. The Conference Report explained that the increase was needed not only to restore the civil penalty ceilings to their original levels given the increased cost of living since 1977, but also because "a simple restoration will not achieve penalty levels high enough to serve as an effective deterrent to future violations of the Act." H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 689 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2374, 2394.

board given the five-fold increase in the maximum allowable penalty." H. R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 689 (1990), *reprinted in* 1990 U.S.C.C.A.N 2374, 2394.

Moreover, the court's speculation does not alleviate the "untenable position" in which an operator is placed in this situation, as the Tenth Circuit itself previously recognized:

> If the inspector does not agree with the operator's determination that someone is not an authorized miners' representative for § 103(f) purposes, . . . the operator must risk the issuance of a citation, the assessment of civil penalties, and the possible closure of a portion of the mine before it can get a determination from the Commission whether it was justified in refusing to allow the purported representative to exercise walkaround rights.

Utah Power & Light, 897 F.2d at 456. *Amici* question why, if the court found the operator's plight "untenable" then, the same court can find it so tolerable now.

The only answer that the court gave was that an operator can avoid daily penalties either by abating the violation while proceeding with the appeals process, or by seeking an expedited hearing. 969 F.2d at 976. But, as we have shown, this reasoning overlooks the irrecoverable costs of abatement—which may require extensive and expensive physical changes in a mine and, in this case, the surrender of a statutorily protected right—which preenforcement review could have spared the operator. Moreover, the court overstates the significance of an expedited hearing. The sole authority which the court cites provides that an expedited hearing "shall not be scheduled with less than four days notice." 29 C.F.R. § 2700.52(b) (1992). It does not guarantee that an expedited hearing will be held within four days of the notice, as the court below intimated, but only that it cannot be held on less than four days' notice. Even when an expedited hearing

(which is discretionary) is granted, relief may be more than a year away. *E.g., Utah Power & Light Co., Mining Div.*, 13 F.M.S.H.R.C. 1617 (1991). Moreover, the regulation does not provide for a stay of daily penalties, which can continue to accure "for each day during which [the] failure [to abate] or violation continues." Mine Act § 110(b), 30 U.S.C. § 820(b) (1988). The court's suggestion that it "apparently" does is wholly unsupported. *See* 969 F.2d at 976.

B. The Secretary's Regulations Construing Section 103(f) Of The Mine Act Threaten Operators' Rights Under Federal Labor Law.

The expenditure of unnecessary abatement costs is not the only irreparable harm that can flow from the preclusion of preenforcement judicial review. The instant case presents a particularly compelling illustration of other risks that operators face if they must wait for the administrative review process to run its lengthy course before they can obtain judicial review.

When the Secretary invokes Part 40 of his regulations [24] to force a nonunion operator to admit a union organizer to company property during an organizing campaign, the operator suffers legal injury in two respects: he sacrifices private property rights as well as

[24] 30 C.F.R. Part 40 (1992). Part 40 purports to implement § 103(f) of the Mine Act, which provides that a "representative authorized by his miners" shall be given the opportunity to accompany an MSHA inspector during an inspection of the mine "for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." 30 U.S.C. § 813(f) (1988). The Secretary's regulations define "representative of miners" as "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act." 30 C.F.R. § 40.1(b)(1) (1992). An individual becomes a "representative of miners" by filing designation forms and other information with the Secretary and the operator, and the operator is required to post the designation on the mine bulletin board. 30 C.F.R. §§ 40.2-40.4 (1992).

rights conferred on him under federal labor law, and he risks being charged with unfair labor practices under those laws. The principal right that he sacrifices—the right to exclude strangers from private company property—was upheld by this Court just last Term in *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992). *Lechmere* reaffirmed the "general rule" that an employer has a right to bar nonemployee union organizers from his property. *Id.* at 847 (quoting *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978)). The only exception is the "rare case" involving "inaccessible" employees. *Lechmere*, 112 S. Ct. at 848 (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

The union's burden of establishing such isolation is "a heavy one," *id.* at 849, giving the union a powerful incentive to seek other ways to "legitimize" its organizers' presence on mine property. But by choosing to advance its organizing goals by exploiting the Secretary's Part 40 regulations, the union nullifies an operator's right to exclude trespassers. Moreover, the operator's injury is compounded, because status as a "representative of miners" gains the union not only physical presence on mine property, but a host of other entitlements as well.[25] If a

[25] For example, a representative of miners stands in a privileged position to participate as a full-fledged party in all proceedings before the Commission and in petition for modification proceedings. *See* 30 U.S.C. §§ 811(c), 815(d), 817(e)(1), 821 (1988); 29 C.F.R. § 2700.4(a)-(b) (1992). He must also be given access to mine maps and the roof control plan at underground mines and must receive a copy, with opportunity to comment, of the mine's training plan. 30 C.F.R. §§ 48.3, 48.23, 75.220, 75.1203 (1992). In addition, he has the legal authority to initiate formal review proceedings of various types before the Commission and the Secretary. *See, e.g.*, 30 U.S.C. §§ 811(c), 815(d), 817(e)(1), 821 (1988). If an organizing campaign leads to litigation before the NLRB (an agency whose procedures do not provide for prehearing discovery), a union's MSHA-compelled access to company information can be particularly inequitable to the employer. *See generally* 29 C.F.R. Subpart B

nonunion operator is precluded from seeking preenforcement judicial review of his compelled recognition of the organizer as a "representative of miners," the organizing campaign can run its course before the operator's challenge to the Secretary's enforcement action can be heard by the Commission, let alone by a court of appeals, as happened in *Mid-Continent Resources, Inc., supra*. *See* 12 F.M.S.H.R.C. at 950-51 (citation and order, May 1986; NLRA representation election, December 1986; Commission decision finding case moot and refusing to reach merits, May 1990).

Besides obliterating private property rights, the forced recognition of a union organizer as a "representative of miners" also conflicts with the NLRA's scheme of exclusive, majority-based representation. *See* 29 U.S.C. § 159(a) (1988). Under the NLRA, a unionized employer commits an unfair labor practice if he negotiates or "deals with" any representative other than the majority representative. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684, 687 (1944). This principle controls labor relations at the workplace, notwithstanding the potentially conflicting policies of other statutes. *See Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 69-73 (1975) (Marshall, J.) (black employees' statutory interest in eliminating racial discrimination under Civil Rights Act did not justify their attempt to resolve employment dispute directly with employer instead of through union). Dealing with a representative whose majority status is unproven is an unfair labor practice—it would give the reputed representative "a deceptive cloak of authority with which to persuasively elicit additional employee support." *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 736 (1961).

The MSHA-forced recognition of a Mine Act "representative of miners" puts an operator in precisely this

(1992). *See also* NLRB, *Casehandling Manual* §§ 10292.4, 10352 (1983).

bind. By compelling an operator in the midst of a union organizing campaign, under threat of a Mine Act withdrawal order, daily civil penalties, and criminal liability for failure to comply, to deal with this "representative" on a mandatory bargaining subject [26] even though it may represent only two employees in a much larger work force, the Secretary confers a "deceptive cloak of authority" on the union organizer, impedes the operator's fulfillment of his duty under the NLRA to avoid dealing with nonmajority representatives, and infringes on the other miners' right either to bargain collectively through exclusive, majority-based representation of *their* choosing, or to "refrain from" such activities if they so desire, as the NLRA entitles them to do. *See* NLRA § 7, 29 U.S.C. § 157 (1988).[27]

The UMWA's use of the Secretary's Part 40 regulations to circumvent the NLRA was not confined to Thunder Basin. As the findings of fact by the ALJ in *Kerr-McGee* unequivocally reveal, "[t]he use of 30 C.F.R. Part 40 and the designation of miners' representatives was part of the UMWA's organizing strategy and was an organizing 'tool.'" *Kerr-McGee, supra*, 13 F.M.S.H.R.C. at 1898. Because the Secretary and the Commission sim-

[26] Workplace safety and health are among the mandatory "terms and conditions of employment" that are within the scope of the exclusive representation principle. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 218 (1964) (Stewart, J., concurring).

[27] It can create other practical difficulties as well. It can force a unionized operator to deal with a representative (or more than one) of a minority group of miners despite the presence of an exclusive representative under the NLRA. It can also require operators to deal with a "labor organization," as broadly defined by the NLRA, 29 U.S.C. § 152(5) (1988), without any of the protections, rights, or obligations established by that law for employees, employers, and labor organizations. *See generally* 29 U.S.C. §§ 157, 158, 159 (1988). And it can effectively void the results of an election conducted by the NLRB and force a "representative" upon employees even after they have voted to reject that specific representation, as they did in the instant case.

ply refused to consider the violence being done to the NLRA scheme by this abuse of Mine Act procedures, every nonunion mine is exposed to such tactics if the decision below is sustained and all access to the district courts is foreclosed.

CONCLUSION

Thunder Basin's dilemma is a case in point of how the law can leave mine operators in a jurisdictional void. Their constitutional and statutory rights are infringed, but meaningful relief is unavailable, and the promise of judicial review at the end of administrative proceedings is an empty one. When statutory conflicts or constitutional questions are involved, the specialized administrative process takes too long to avert irreparable harm to an operator caught in the middle. Moreover, limitations on administrative authority enable adjudicating agencies to disclaim expertise and avoid jurisdiction, and thus to strand the operator with his rights impaired and with conflicting statutory obligations. Due process requires an avenue for relief, yet the court below would foreclose a mine operator's only possible recourse—district court. Therefore, the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

Of Counsel:
EDWARD M. GREEN
MARK G. ELLIS
AMERICAN MINING CONGRESS
1920 N Street, N.W.
Washington, D.C. 20036

WILLIAM E. HYNAN
NATIONAL COAL ASSOCIATION
1130 17th Street, N.W.
Washington, D.C. 20036

TIMOTHY M. BIDDLE *
THOMAS C. MEANS
J. MICHAEL KLISE
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500
Attorneys for Amici Curiae American Mining Congress and National Coal Association

* Counsel of Record

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Thunder Basin Coal Company,
Petitioner,
v.
Robert B. Reich, Secretary of Labor, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF AMICUS CURIAE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA IN SUPPORT OF RESPONDENTS

Patrick K. Nakamura *
George N. Davies
Longshore, Nakamura & Quinn
2100 First Avenue North
Suite 300
Birmingham, Alabama 35203
(205) 323-3504

Robert H. Stropp, Jr.
Mary Lu Jordan
United Mine Workers of America
900 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 842-7830

Attorneys for Amicus Curiae United Mine Workers of America

* Counsel of Record

Dated: June 23, 1993

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QUESTION PRESENTED FOR REVIEW

Whether the District Court lacked jurisdiction to enjoin the Mine Safety & Health Administration from enforcing its regulations governing the miners' right to designate a representative for purposes of the Federal Mine Safety and Health Act of 1977.

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
THE DISTRICT COURT LACKED JURISDICTION TO ENJOIN THE MINE SAFETY & HEALTH ADMINISTRATION FROM ENFORCING ITS REGULATIONS GOVERNING THE MINERS' RIGHT TO DESIGNATE A REPRESENTATIVE FOR PURPOSES OF THE FEDERAL MINE SAFETY & HEALTH ACT OF 1977	4
A. The Mine Act Sets Forth A Comprehensive Scheme Of Administrative and Judicial Review With The Judicial Review Vested Exclusively In The Court of Appeals	4
B. Nothing Petitioner Claims Justifies Deviating From the Statutory Review Scheme	8
1. Petitioner Was Never Required to Waive Rights Under the National Labor Relations Act	8
2. Compliance with the Mine Act's Statutory Review Scheme Did Not Pose a Due Process Problem	13
a. Petitioner Would Not Have Suffered Irreparable Harm If It Refused To Comply With MSHA's Enforcement Action While Availing Itself Of Statutory Review Procedures	13

TABLE OF CONTENTS—Continued

	Page
b. Petitioner Would Not Have Suffered Irreparable Harm If It Had Chosen To Comply With MSHA's Interpretation While Availing Itself Of The Statutory Review Procedures	16
C. The Miners Will Suffer Irreparable Harm If An Operator Is Allowed To Circumvent The Statutory Review Procedure	18
D. Circumventing the Statutory Review Scheme Deprived the Review Commission of an Opportunity to Apply Its Expertise	20
CONCLUSION	26

TABLE OF AUTHORITIES

CASES

	Page
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)	4
Bell v. Hood, 327 U.S. 678 (1946)	7
Bituminous Coal Operators' Association v. Marshall, 82 F.R.D. 350 (D.D.C. 1979)	*passim*
Donovan v. Dewey, 452 U.S. 594 (1981)	10, 12, 20
Lechmere, Inc. v. NLRB, —— U.S. ——, 112 S.Ct. 841 (1992)	9
Leedom v. Kyne, 358 U.S. 184 (1958)	13
NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956)	9
Oestereich v. Selective Service System Local Board, 393 U.S. 233 (1968)	13
Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974)	12
Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978)	12
Thunder Basin Coal Co. v. Martin, 969 F.2d 970 (10th Cir. 1992)	*passim*
Traynor v. Turnage, 485 U.S. 535 (1988)	12
REGULATORY PROCEEDINGS	
Alabama By-Products Corp., 4 FMSHRC 2128 (1982)	21
Clinchfield Coal Company v. Secretary of Labor, 11 FMSHRC 2120 (1989)	15
Council of Southern Mountains, Inc. v. Martin County Coal Corp., 6 FMSHRC 206 (1984) *aff'd sub nom., Council of Southern Mountains, Inc. v. Federal Mine Safety & Health Review Commission*, 751 F.2d 1481 (D.C. Cir. 1985)	24
Cyprus Empire Corporation v. Secretary of Labor and United Mine Workers of America, 15 FMSHRC 10 (1993)	23, 25
Emery Mining Corp., 10 FMSHRC 276 (1988), *aff'd Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990)	10, 19, 24
Gooslin v. Kentucky Carbon Corp., 3 FMSHRC 8 (1981)	21

TABLE OF AUTHORITIES—Continued

	Page
Kaiser Coal Corporation v. Secretary of Labor, 10 FMSHRC 1165 (1988)	21, 22, 23
Kenny Richardson, 3 FMSHRC 8 (1981); *aff'd sub nom., Richardson v. Secretary of Labor*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983)	21
Kentland Elkhorn Coal Corp., 1 FMSHRC 1033 (1979) *reversed, United Mine Workers of America v. FMSHRC*, 671 F.2d 615 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 927 (1982)	24
Kerr-McGee Coal Corp. v. Secretary of Labor, 13 FMSHRC 1889, 91-84-R, *aff'd* West, 15 FMSHRC (March 4, 1993), *petition for review docketed* No. 93-1250 (D.C. Cir. April 1, 1993)	*passim*
Magma Copper Co., 1 FMSHRC 1998 (1975) *aff'd in part, Magma Copper Co. v. Secretary of Labor*, 645 F.2d 694 (9th Cir. 1981), *cert. denied*, 454 U.S. 940 (1981)	24
New York Dep't of Transp., 2 FMSHRC 1765 (1980)	21
Peabody Coal Co., 6 FMSHRC 183 (1984)	21
Secretary of Labor on behalf of David Parula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980)	25
Southern Ohio Coal Company v. Secretary of Labor, 13 FMSHRC 1149 (1991)	15

FEDERAL STATUTES

5 U.S.C. § 554(e)	22
28 U.S.C. § 1331	7, 12
30 U.S.C. § 811(c)	18
30 U.S.C. § 811(d)	22
30 U.S.C. § 813(a)(1)	9
30 U.S.C. § 813(f)	2, 20
30 U.S.C. § 814(b)	13
30 U.S.C. § 815(b)	14
Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91-173, 83 Stat. 742 *et seq.*	1

TABLE OF AUTHORITIES—Continued

	Page
Federal Mine Safety and Health Act of 1977, 83 Stat. 742, 91 Stat. 1290, 93 Stat. 695, 30 U.S.C. §§ 801-962, *as amended*	2
National Labor Relations Act of 1935, 29 U.S.C. § 141-187, 61 Stat. 136 ("NLRA")	3

FEDERAL REGULATIONS

29 C.F.R. § 2700.46 and § 2700.47	15
29 C.F.R. § 2700.52	14
30 C.F.R. § 40.4	11, 18

LEGISLATIVE MATERIALS

H.R. Conf. Rep. No. 91-761, 91st Cong., 1st Sess. (1969), *reprinted in* 1969 U.S.C.C.A.N. 2578	18
S. Rep. No. 95-181, 95th Cong., 1st Sess. (1977) *reprinted in* 1977 U.S.C.C.A.N. 3401	7
56 Fed. Reg. 27034 (June 12, 1991)	18

MISCELLANEOUS

Biddle, *Coal Law & Regulation*, Vol. 1 Mine Safety and Health (1990)	20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-896

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Petitioner,

v.

ROBERT B. REICH, SECRETARY OF LABOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF AMICUS CURIAE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The United Mine Workers of America ("UMWA") is a labor organization which represents employees in the coal mining industry. The UMWA was instrumental in seeking passage of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. 91-173, 83 Stat. 742 *et seq.* (and its successor the Federal Mine Safety and Health Act of 1977), after 78 coal miners died in a mine explosion in Farmington, West Virginia in 1968. The UMWA, whose motto is "Safety First," has thus demonstrated a long-standing interest in the health and safety

of the nation's coal miners at both union and non-union mines.

In this case, the Petitioner filed a preemptive action in the U.S. District Court to bar MSHA's enforcement of the selection by Petitioner's employees of UMWA Health and Safety representatives as "representative of the miners" for purposes of, among other things, exercising the "walkaround" right authorized by the Federal Mine Safety and Health Act of 1977, 83 Stat. 742, 91 Stat. 1290, 93 Stat. 695, 30 U.S.C. §§ 801-962, *as amended* ("The Mine Act"). 30 U.S.C. § 813(f). In doing so, the Petitioner sought to circumvent the comprehensive review procedures provided by the Mine Act. In holding that the District Court lacked jurisdiction to entertain such an action, the Tenth Circuit, in its opinion below, recognized that such preemptive actions could seriously undermine Congress' intent to provide for the prompt enforcement of the Mine Act. *Thunder Basin Coal Co. v. Martin*, 969 F.2d 970, 975 (10th Cir. 1992).

The UMWA has a compelling interest in the prompt and unhampered enforcement of the Mine Act. The UMWA believes that the Tenth Circuit was correct in holding that the District Court lacked jurisdiction and believes further that the Tenth Circuit's judgment should be affirmed.

STATEMENT OF THE CASE

Amicus adopts the Respondents' Statement of the Case.

SUMMARY OF ARGUMENT

The Mine Act sets forth a comprehensive scheme of administrative and judicial review which fully and adequately allows a mine operator to litigate all claims it wishes to assert. This review scheme, when considered in light of the Congressional objective of prompt enforcement of the safety and health provisions of the Mine Act, provides clear and convincing evidence of an intent

to preclude a mine operator from making a preemptive strike and filing a preenforcement injunctive action in district court.

To allow a mine operator to file a preenforcement action in district court could seriously hamper enforcement of the Act, particularly since, as recognized by the Tenth Circuit below, it is an easy task to frame a challenge to the application of a regulation under the Mine Act in terms of a statutory conflict or constitutional violation. This case illustrates the Tenth Circuit's warning.

Nothing in the Petitioner's claims warrant deviating from the statutory review procedures. Nothing in the Mine Act requires the Petitioner to waive any rights it claims under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141, *et seq.* 61 Stat. 136, and therefore there is no statutory conflict. Furthermore, the Mine Act provides adequate safeguards, including a meaningful right to request an expedited hearing, and the assessment of penalties only after hearing, to protect Petitioner's constitutional rights, in light of the Congressional concern for prompt enforcement of the Mine Act.

Had Petitioner not chosen to make a preemptive strike, but rather had followed the statutory review procedure, the Review Commission in the first instance, and then the Court of Appeals, would have entertained and considered both of Petitioner's claims. By circumventing the Commission, the parties and the reviewing court were deprived of the aid of the Commission's experience and expertise in construing the walkaround provision. Moreover, the Commission was deprived of the opportunity to interpret the walkaround provision in a manner consistent with rights claimed by Petitioner under the NLRA.

ARGUMENT

THE DISTRICT COURT LACKED JURISDICTION TO ENJOIN THE MINE SAFETY & HEALTH ADMINISTRATION FROM ENFORCING ITS REGULATIONS GOVERNING THE MINERS' RIGHT TO DESIGNATE A REPRESENTATIVE FOR PURPOSES OF THE FEDERAL MINE SAFETY & HEALTH ACT OF 1977

A. The Mine Act Sets Forth A Comprehensive Scheme Of Administrative and Judicial Review With The Judicial Review Vested Exclusively In The Court of Appeals

The Petitioner's and Respondents' briefs set out the administrative and judicial review procedures available under the Mine Act and there is no need to repeat them here. These procedures which provide for a citation, abatement, penalties and initial review by an administrative agency and only thereafter by a U.S. Court of Appeals, reflect a congressional interest in prompt enforcement of the mine safety and health laws and, taken as a whole, provide clear and convincing evidence of an intent that district courts not entertain preenforcement actions.

These were the findings made by Judge Gesell in *Bituminous Coal Operators' Association v. Marshall,* 82 F.R.D. 350 (D.D.C. 1979). That case involved the same issue which is the subject of this case. In *Bituminous Coal Operators,* the Mine Safety and Health Administration ("MSHA") issued a bulletin interpreting § 103(f) and its implementing regulations. The Association brought an action seeking injunctive relief against implementation of the bulletin claiming that it was issued in violation of the Admnistrative Procedure Act and was unconstitutional. After making a thorough analysis of the Mine Act's review procedures the Court concluded that under the "clear and convincing" standard of *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967), the Court lacked jurisdiction over the preenforcement challenge. Judge Gesell found that the Mine Act, in providing for an unrestricted review of disputes under the Mine Act by the Federal Mine Safety and Health Review Commission and then by a U.S. Court of Appeals, provided two adequate forums for adjudicating all legal claims made by the mine operator, and clearly evidenced an intent to preclude review by a district court. 82 F.R.D. at 353-354.

The Tenth Circuit, in *Thunder Basin Coal Co. v. Martin,* 969 F.2d 970 (10th Cir. 1992), also holding that district courts did not have jurisdiction to hear preenforcement challenges to the Mine Act, cited to Judge Gesell's opinion several times with approval. Similarly, the Tenth Circuit concluded that the procedure providing for review by the Review Commission and a U.S. Court of Appeals revealed that Congress intended to limit district court jurisdiction. The Tenth Circuit found that the Review Commission and U.S. Court of Appeals would entertain constitutional and statutory conflict challenges to the Act so that an operator's interest could be fully and adequtaely litigated.

The Tenth Circuit went on to observe that certain portions of the Mine Act's legislative history lent "special support" to the view that Congress intended to enhance the swift enforcement of the Act by limiting the ability of an operator to invoke the jurisdiction of a district court. *Thunder Basin,* 969 F.2d at 974-975. The Court noted that in enacting the 1977 Mine Act (and thereby amending the 1969 Coal Act), Congress was concerned that the old law did "not provide means to react quickly enough to newly manifested health hazards." *Thunder Basin,* 969 F.2d at 974 (citing S.Rep. No. 181, 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1977 U.S.C.C.A.N., 3401, 3408). Thus in order to streamline the process and provide for more meaningful enforcement, Congress, among other things, eliminated a mine operator's ability to file a challenge in district court to obtain a *de novo* trial over penalties assessed under the Mine Act. 969

F.2d at 974. The Tenth Circuit noted further that the Senate report, in discussing the grant of jurisdiction given to the U.S. Court of Appeals after review by the Commission, indicated that the intention was that "the penalty litigation should move with no undue delay." 969 F.2d at 974-975.

Thus it is clear from the method of the enforcement scheme, which provides strong incentives for quick compliance, and from relevant portions of the Act's legislative history, that prompt enforcement was a paramount congressional objective in passage of the Mine Act. Yet, as the Tenth Circuit observed, allowing operators to file preenforcement challenges in a district court, based on alleged constitutional and statutory conflict grounds, would undermine that objective and affect safety in the mines. The Tenth Circuit wrote:

> "Permitting district court jurisdiction on the basis of claims of constitutional violations or conflict with other statutes would permit preemptive strikes that could seriously hamper effective enforcement of the Act, disrupting the review scheme Congress intended. Challenges to regulations and provisions under the Mine Act are easily characterized in constitutional terms and as conflicting with other statutes. *See, e.g. Utah Power & Light,* 897 F.2d at 452 (argument that allowing nonemployees walkaround rights under § 813(f) infringes property rights); *United States Steel,* 471 F.Supp. at 439 (plaintiff alleged that complaint involving the Mine Act arose under the Fourth, Fifth, Sixth and Eighth Amendments and Administrative Procedure Act); *Bituminous Coal,* 82 F.R.D. at 352 (plaintiff claimed, *inter alia,* that bulletin giving interpretations of § 813(f) was in violation of 5 U.S.C. § 553 and was unconstitutional)."

969 F.2d at 975.

As a practical matter then, mine operators could seriously hamper enforcement of the Mine Act with little

difficulty by invoking the jurisdiction of the district court under 28 U.S.C. § 1331, particularly since, as the Petitioner argues, all that is required of an operator is for it to frame its complaint to overcome the "so patently without merit" standard of *Bell v. Hood,* 327 U.S. 678, 673 (1946). (Brief of Petitioner at pp. 24-25). Such was not the intent of Congress in creating the enforcement procedures through the Coal and Mine Acts. In passing those Acts, Congress was cognizant that it was regulating an industry whose working conditions were among the most hazardous in the country, and whose operators had been "dragging their feet" when it came to compliance with health and safety standards.[1] Congress thus sought enforcement procedures that would provide incentive for quick compliance with the Act to assure that dangerous conditions would not go uncorrected and mines would become relatively safe places to work. Disrupting enforcement by allowing a district court to insert itself in that process would undermine that Congressional objective.

This case illustrates the danger recognized by the 10th Circuit that operators can easily frame meritless challenges to the Mine Act in terms of constitutional violations or as conflicting with other statutes. Petitioner did just that in this case. As we show below, nothing in Petitioner's claims justifies deviating from the statutory review scheme.

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[1] The Senate Report to the Mine Act, after listing the frequent mine disasters which had occurred since passage of the Coal Act and the Federal Metal and Non-Metallic Mine Safety Act of 1966, P.L. 89-577, stated, "It is unacceptable that years after enactment of these mine safety laws, miners can still go into the mines without even rudimentary training in safety. Mine operators still find it cheaper to pay minimal civil penalties than to make the capital investments necessary to adequately abate unsafe or unhealthy conditions, and there is still no means by which the goverment can bring habitual and chronic violators of the law into compliance." S. Rep. 95-181, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3404.

B. Nothing Petitioner Claims Justifies Deviating From the Statutory Review Scheme

1. *Petitioner Was Never Required to Waive Rights Under the National Labor Relations Act*

The Petitioner attempted to invoke the jurisdiction of the district court by first claiming that there exists in this case a conflict between the NLRA and the Mine Act with respect to the walkaround provision. Petitioner argues that allowing its employees to choose a union health and safety representative to be the representative of the miners under the Mine Act, would require the Petitioner to waive rights it claims to have under the NLRA to exclude non-employee organizers who enter the property for organizing purposes. This claim is specious.

The Petitioner was never required to waive rights under the NLRA. Conversely, the NLRA does not give an employer the right to exclude a non-employee who is exercising his statutorily circumscribed rights as a miner's representative under the Mine Act.

Conceptually, it is helpful to remember that a property owner has certain private property rights emanating from the common law, which generally allow it to exclude anyone it wishes from its property. However, certain federal, state and local laws have carved out limited exceptions to those property rights for limited purposes. Thus, to provide a simple example, a private landowner may be required by statute to allow a repairman from the city water department on his property for the limited purpose of fixing a broken city water line. If, however, the repairman strayed from his repair duties, the landowner would be justified in exercising his property rights and evicting the repairman from the property.

Similarly, both the NLRA and the Mine Act have carved out limited exceptions to property rights. With

respect to the NLRA, in *Lechmere Inc. v. NLRB*, —— U.S. ——, 112 S.Ct. 841 (1992), this Court reaffirmed the holding of *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), that there must be an accommodation between the preservation of the employer's common-law private property rights and the employees' right under § 7 of the NLRA "to learn the advantages of self-organization from others." 112 S.Ct. at 845 (quoting from *Babcock & Wilcox*). Thus this Court stated:

> "As a rule, then, an employer cannot be compelled to allow distribution of union literature by non-employee organizers on his property. As with many other rules, however, we recognized an exception. Where 'the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, . . . 'employers' property rights may be 'required to yield to the extent needed to permit communication of information on the right to organize . . .'" (quoting from Babcock & Wilcox) (citations omitted)

—— U.S. ——, 112 S.Ct. at 846. Thus, an employer may in certain limited circumstances be required to allow access to his property to non-employee union organizers. However, if those circumstances do not exist, *Lechmere* holds that the employee's § 7 rights are unaffected and the employer can exercise his common law private property rights to exclude the non-employee organizer.

The inspection and walkaround provisions of the Mine Act are another limited but separate exception to the owner's private property rights. The Mine Act allows a representative of the Secretary of Labor (usually an MSHA inspector) to make periodic unannounced inspections of mine property to determine compliance with the Act. 30 U.S.C. § 813(a)(1). Furthermore a person chosen by the employees as a representative of the miners is allowed to accompany the MSHA inspector for the

purpose of these periodic inspections. In upholding the constitutionality of these inspections, which do not require a warrant, this Court noted that the mine operator had a diminished expectation of his private property rights in view of Congress' pervasive and defined regulation of an industry "with a notorious history of serious accidents and unhealthful working conditions." *Donovan v. Dewey*, 452 U.S. 594 (1981). As with the other examples of a statutory exception to the owner's property interest, if the miner representative, whether an employee or non-employee, were to go beyond the limited license the Mine Act gives him during a walkaround, the mine owner could assert his private property rights.

This was essentially the response the Tenth Circuit made to the Petitioner's statutory conflict and irreparable injury claims in its opinion below. *Thunder Basin*, 969 F.2d at 976-977. (" . . . if § 813(f) was being abused, an operator's solution would be to 'take action against individual instances of abuse when it discovers them.'" (citing *Utah Power & Light v. Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990))). This was also the response the Review Commission made to the same argument in *Kerr-McGee Coal Corp. v. Secretary of Labor*, 13 FMSHRC 1889, *aff'd*, WEST, 91-84-R, et al., 15 FMSHRC—(March 4, 1993), petition for review docketed, No. 93-1250 (D.C. Cir. April 1, 1993), cited by the Petitioner.

There, the Review Commission did entertain and consider the identical argument made by Thunder Basin in this case, that allowing UMWA representatives to be "representatives of the miners" amounted to a waiver by Kerr-McGee of rights under the NLRA. The Review Commission considered the NLRA, but found that the Secretary interpreted the walkaround provision of the Mine Act by the circumscribed activity allowed and not merely by the union or non-union status of the representatives chosen by the employees. The Review Commission

did not hold that the mine operator would have to allow a non-employee organizer on the property for the purpose of organizing activity like, for example, that described in *Lechmere* or *Babcock and Wilcox* (handbilling or solicitations to sign union authorization cards). To the contrary, the Review Commission agreed with the Secretary's position that nothing in the Mine Act's walkaround regulations impinge on Kerr-McGee's right under the NLRA to deny access to its property to non-employees engaged in union organizing and made it clear that abuse by a representative of the miners of his rights under the Mine Act could be resolved on an individual rather than a *per se* basis. *Kerr-McGee*, slip op. at 10-11. In *Kerr-McGee*, as here, there was no evidence that those rights had been abused.

Seen in this light, there is no conflict between the NLRA and the Mine Act. Each provides narrow exceptions to the property owners private property interests and no more. If the activity of the non-employee goes beyond the activity prescribed by each Act, then within the narrow circumstances of each Act, the owner can assert his private property right.

This *lack of a conflict* also makes clear that a pre-enforcement action in district court was singularly inappropriate here. Thunder Basin filed its district court complaint after the MSHA inspector merely had ordered it to post the designation by the employees of the UMWA representatives as the representative of the miners on the mine bulletin board pursuant to 30 C.F.R. § 40.4., and the Petitioner had refused. The UMWA representatives never actually exercised the walkaround rights (or any other right) under the Act, and therefore, there is no record at all of compliance with or abuse of those rights.[2]

[2] Although Petitioner has emphasized the walkaround right, as a practical matter, it is unlikely that a miners' representative who is not also an employee will be able to exercise that right with any frequency or regularity. MSHA inspections are unannounced and the non-employee representative would not know when to be at the

Furthermore because of the district court's exercise of jurisdiction and issuance of an injunction, the Review Commission was unable to review the case, call upon its expertise in dealing with the walkaround provision of the Act, and issue an interpretation of the walkaround provision which contemplates no conflict with the Petitioner's property rights as it pertains to the NLRA.[3]

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mine. For that reason, employee alternates are also designated. The non-employee representative's presence at the mine, therefore, may wind up being limited to those situations when a particular hazard has been reported, or an accident has occurred.

It would also not be surprising of the non-employee safety expert was called upon when it came to exercising the right of the miners' representative to review the various mining plans required to be submitted by a mine operator to MSHA. This Court has recognized that mining operations are "unique," "complex," and "hazardous," *Donovan v. Dewey*, 452 U.S. at 603, n.8, so that expertise in reading and comprehending mine plans would be critical.

[3] Although we need go no further with this argument, we note that Petitioner and the Amici, American Mining Congress and National Coal Association, mistakenly argue that the NLRA "provided the employer with the basic right . . . to exclude non-employee union organizers from his property." (citing *Lechmere* and *Babcock and Wilcox*) (Petitioner's brief at p. 26) As we have shown above, Petitioner's right to exclude non-employee union representatives emanates from the common law rather than any provision of the NLRA. In this context the NLRA does not provide the employer with any rights. It only provides rights to the employees under § 7 to organize and receive information.

This is made clear when one considers that an employer has no federal forum to initiate exclusion of non-employee organizers and must bring a common law action for trespass in state court to exercise his property right to evict such persons. *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 202 (1978). Furthermore, under the "well pleaded complaint rule" the employer could not base federal question jurisdiction on the non-employee organizer's anticipated § 7 defense. *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974).

This calls into question whether Petitioner can assert a statutory conflict claim on which subject matter jurisdiction under 28 U.S.C. § 1331 can be based. Petitioner has asserted that under the authority of *Traynor v. Turnage*, 485 U.S. 535 (1988), *Oestereich v.*

2. *Compliance with the Mine Act's Statutory Review Did Not Pose a Due Process Problem*

a. *Petitioner Would Not Have Suffered Irreparable Harm If It Had Refused To Comply With MSHA's Enforcement Action While Availing Itself Of Statutory Review Procedures*

Petitioner's due process challenge to the Mine Act's review procedures themselves is equally without merit because Petitioner has failed to show that it would have suffered irreparable harm if it had first refused to comply with MSHA's enforcement order to post the designation and then availed itself of the review procedures. The Mine Act's review procdures provide adequate safeguards to minimize the harm to the operator pending review by the Commission.

When the Petitioner refused to post the designation the MSHA inspector could have first issued a citation, and if Petitioner's refusal continued, the inspector could have issued a "withdrawal" order under § 104(b) of the Mine Act. 30 U.S.C. § 814(b). As in *Kerr-McGee*, however, that order would not have affected any area of the mine and production of coal would have gone on uninterrupted.

Although the Act provides for civil penalties, including daily penalties for continued non-compliance, as the Tenth Circuit noted, if the operator contests the citation and order before the Commission, such penalties are not assessed until after a full hearing. Furthermore, the Com-

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Selective Serv. Sys. Local Bd., 393 U.S. 233 (1968), and *Leedom v. Kyne*, 358 U.S. 184 (1958), the district court has jurisdiction of a suit to prevent an administrative agency from depriving persons of a "'right' assured them by Congress." (quoting from *Leedom v. Kyne*, 358 U.S. at 189). In each of those cases the Plaintiff asserted certain explicit rights granted to him by Congress. Here, it is not a right provided by Congress of which Petitioner claims it has been deprived.

mission is not bound by MSHA's proposed penalty but can assess a higher or lower one depending upon the facts and circumstances of the case.

Moreover, a document in the Joint Appendix indicates that MSHA probably would not have proposed a daily penalty against Thunder Basin had the operator requested an expedited hearing under the Mine Act to quickly litigate its challenge. Page 36 of the Joint Appendix, which was Exhibit 12 attached to the Petitioner's original district court complaint, is an internal MSHA memorandum from the sub-district manager to the district manager concerning another operator, Kerr-McGee's, refusal to post the notice regarding the miners' representatives. That memorandum indicates that MSHA advised the operator that the daily nonabatement penalty would probably not be imposed if the operator initiated a request for an expedited hearing before the Review Commission. Furthermore, the actual proposal for the daily penalty did not take place until over two months after the citation and order were issued, during which time no expedited hearing was requested. (See pp. 42-43 of Joint Appendix, Exhibit 15 to Petitioner's district court complaint, letter dated January 2, 1991 from the MSHA to Kerr-McGee Coal Corp. noting the citation dated October 24, 1990 and indicating that a daily civil penalty would be recommended if the operator did not comply.)

As the above-referenced documents reveal and as the Tenth Circuit pointed out in its opinion, the Petitioner could have availed itself of the expedited hearing procedures set out at 29 C.F.R. § 2700.52 had a citation and order been issued. 969 F.2d at 976. That section provides for a hearing on the merits of the case with 4 days notice or even less if the parties consent. Moreover § 105 (b) of the Mine Act allows an operator to request temporary relief from the withdrawal order which would remove the threat of daily penalties. 30 U.S.C. § 815(b). (The requirements for temporary relief from a withdrawal

order are very similar to the requirements for an injunction in federal district court. (§§ 2700.46-2700.47)).[4]

These expedited hearing procedures have been effectively used in the past by mine operators. For example, in *Clinchfield Coal Company v. Secretary of Labor,* 11 FMSHRC 2120 (1989), the operator obtained a hearing before an Administrative Law Judge six days after issuance of the withdrawal order and an order vacating the withdrawal order 21 days after the close of the hearing. The five-member Review Commission heard the appeal on an expedited briefing and argument schedule and issued its opinion 10 weeks later. In *Southern Ohio Coal Company v. Secretary of Labor,* 13 FMSHRC 1149 (1991) a mine operator was able to obtain an expedited hearing 8 days after filing its motion to expedite. The judge issued a written opinion 8 days later.

Thus, on their face and as implemented by MSHA, for those mine operators who choose not to abate the violation, the review procedures under the Act provide ample safeguards to protect the rights of the mine operator while it litigates disputes under the Act.[5]

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[4] The hearing procedures allow for discovery in ways similar to those under the Federal Rules of Civil Procedure, including the taking of depositions and the requesting of documents. The procedures allow the ALJ to shorten the time for responses and to set the time and place of depositions, if the parties cannot agree. This would allow a mine operator a method of obtaining discovery even if it were to request an expedited hearing.

[5] We note also that, although Petitioner has argued that it could be assessed a civil penalty of up to $50,000 as evidence of the irreparable harm it could suffer, (Petitioner's brief at p. 5) in *Kerr-McGee* the ALJ assessed a civil penalty of only $300, 13 FMSHRC at 1906, which the Commission affirmed.

b. ***Petitioner Would Not Have Suffered Irreparable Harm If It Had Chosen To Comply With MSHA's Interpretation While Availing Itself Of The Statutory Review Procedures.***

The Petitioner also argues that if it had chosen to comply with MSHA's interpretation by posting the designation and then litigating its dispute under the Act's review procedures, it would have been irreparably harmed because it would have been forced to waive its rights under the NLRA. As we have shown above, however, compliance with the Mine Act would not have forced Petitioner to waive rights it claims under the NLRA. Walkaround rights are narrowly circumscribed by the Mine Act and are not a license to allow a non-employee to run rampant around the mine operator's property to distribute union literature or solicit authorization cards. The mine operator retains the right to contest the designation of any non-employee representative of the miners who engages in activity other than what is allowed under the Mine Act.[6]

In this case, the only operative facts that had occurred prior to the Petitioner's filing of its district court complaint was its refusal to post the designation. Such posting could hardly amount to irreparable harm. Furthermore, as we noted earlier, as a practical matter, the non-employee UMWA representatives would have had a difficult time personally exercising the walkaround rights. The annual four or more periodic inspections required by the Act are performed without advance notice so that the non-employee could not plan on being at the mine on any particular day.

The assertion that the mine operator would be irreparably harmed by the non-employee miner representative's

[6] We note that the mine operator also has the right to designate a representative to travel with the mine inspector during inspections of the mine. 30 U.S.C. § 813(f). Thus the operator, as well as the MSHA inspector, would witness any abuse by a miners' representative of his walkaround rights that could conceivably occur.

right to review mine books and records during the walkaround is also without merit. The miners' representative would obviously only be able to review what the MSHA inspector could review. Furthermore, in the *Kerr-McGee* case the ALJ found that the only non-public record which the miner representative would have been able to review was certain training records. The ALJ concluded, "[t]he other documents that would be accessible to a miners' representative are accessible to the general public, and the miners' representative thus does not see anything that he could not otherwise see or review." 13 FMSHRC at 1901.

The argument made by the Petitioner and the Amici that the Petitioner will somehow be irreparably harmed because the UMWA representatives who were chosen by the employees to be miners representatives to help promote mine safety will enjoy enhanced status because of the role, is speculative, without merit and in contravention of the clear objectives of the Mine Act. If the miners' representative, whoever he or she is, aids in keeping the conditions at the mine safe and healthy, then the intent of Congress is being carried out. There is certainly nothing in the NLRA which would suggest that its provisions should supersede the safety objectives of the Mine Act.

Finally, the assertion that complying with the employees' selection would subject the Petitioner to an unfair labor practice under the NLRA, if the employees were represented by a union for bargining purposes, is entirely speculative and without merit. The Petitioner has emphatically made clear that it "has never recognized any union as a representative of its employees under the NLRA." (Petitioner's brief at pp. 2-3). Furthermore, the Mine Act does not confer any bargaining rights, as that term is used in NLRA, on a representative of the miners.[7]

[7] The legislative history of the 1969 Coal Act noted that "as used here and throughout the act, the term 'representative of the miners'

For all the foregoing Petitioner would not suffer irreparable harm whether he chose to comply with MSHA's order, or chose not to comply and contest the validity of the order by way of expedited hearing.[8]

C. The Miners Will Suffer Irreparable Harm If An Operator Is Allowed To Circumvent The Statutory Review Procedure

Petitioner repeatedly mischaracterizes the selection of the UMWA representatives by Petitioner's own employees as representative of the miners as "MSHA's UMWA Designation." As the statute and regulations set out, miners' representatives are chosen by employees of the operator. 30 C.F.R. Part 40. In this case, miners were prevented by the district court from selecting representatives of their own choice simply because of those persons' union affiliation. Again, there was no evidence that the chosen representatives had abused their walkaround rights because at the time of the district court's injunction the

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includes any individual or organization that represents any group of miners at a given mine and does not require that the representative be a recognized representative under other labor laws." H.R. Conf. Rep. No. 91-761, 91st Cong., 1st Sess. (1969) *reprinted in* 1969 U.S.C.C.A.N. 2578, 2582.

[8] Amici NCA and AMC suggest that a miners' representative may abuse other rights it has under the Mine Act, particularly under § 101(c) of the Act. 30 U.S.C. § 811(c). At page 15, note 18 of their brief, the NCA and AMC state that the miner representative can intervene in proceedings in which the mine oprator is seeking to obtain a modification of a mandatory health and safety standard under § 101(c) of the Act and cause delay. We point out that under § 101(c) any "interested party" may request a hearing on the operator's petition to modify, and not just the miners' representative. Furthermore, the case cited by the Amici involved the modification of a mandatory safety standard, (the use of air coursed over a conveyer belt full of coal to ventilate areas where miners are working) which is unique because it has been one of the most contentious and controversial issues before MSHA in recent years, spawning much litigation, and the creation of a Belt Air Advisory Commission. 56 Fed. Reg. 27034 (June 12, 1991).

designation had not been posted and the rights had not been exercised.

In the *Utah Power & Light Co. v. Secretary of Labor,* 897 F.2d 447 (10th Cir. 1990), the Tenth Circuit found that a non-employee designated as the miner representative could enhance the safety at the mine because of his expertise in the field of mine health and safety. In *UP&L* the Court noted:

> "Miners may benefit in a number of ways from non-employee representatives participating in walkarounds. For instance, the ALJ in this case found that Rabbitt had held virtually every job in a coal mine and had received special training in health and safety matters, including seminars sponsored by the MSHA that are given to federal inspectors. Furthermore, Rabbitt had investigated "accidents, disasters, fires, and explosions" in various mines. *Emery Mining Corp.,* 8 FMSHRC at 1186. These findings illustrate that a non-employee representative may have greater expertise in health and safety matters than an employee representative.
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> In addition, if a non-employee representative has inspected other mines, his knowledge of those mines may increase his ability to spot problems and to suggest solutions in the mines under consideration. Furthermore, a non-employee representative is not subject to the same pressures that can be exerted by an operator on an employee representative. Therefore, the underlining purposes of § 103(f), and the Act in general, can be furthered by allowing both employees and non-employees to act as miners' representatives for walkaround purposes."

897 F.2d at 452.

In *Kerr-McGee* the Commission reaffirmed the Tenth Circuit's observation that non-employee miners' representatives could enhance the purpose behind § 103(f) because of their greater expertise. As we noted, above, this Court has recognized that mining operations are uniquely com-

plex and hazardous. *Donovan v. Dewey*, 452 U.S. at 603, n. 8. Mining expertise such as that possessed by UMWA representatives would be an important asset. Thus if anyone has suffered irreparable harm it would be the miners at Petitioner's mine. Because Petitioner was allowed to circumvent the statutory review procedure the miners have had to do without the expertise of the non-employee miners' representative and this could only have an adverse effect on safety at the mine.[9]

D. Circumventing the Statutory Review Scheme Deprived the Review Commission of an Opportunity to Apply Its Expertise

As the Tenth Circuit found, Petitioner could have asserted its constitutional and statutory conflict claims in a proceeding before the Review Commission. When Congress established the Commission as an independent adjudicatory body, it intended that the Commission would "develop a uniform and comprehensive interpretation of the law" in order to provide "guidance to the Secretary in enforcing the Act, and to the mining industry and miners in appreciating their responsibilities under the law."[10] Allowing mine operators to circumvent the statu-

[9] In *Bituminous Coal Operators*, Judge Gesell, in the context of determining whether daily civil penalties would be assessed, stated that § 103(f) was not normally vital to human health and safety. 82 F.R.D. at 354. Judge Gesell was no doubt comparing an operator's failure to abide by § 103(f) with a failure to abide by a provision which could create an imminent danger, for example, the over-accumulation of methane which could cause an explosion. As we have shown, given the considerable expertise of the UMWA representative, and the complexity of mining, it cannot be said that a § 103(f) designation and the exercise of rights thereunder is not essential to the promotion of health and safety in a mine.

[10] Nomination hearing, members of the Federal Mine Safety and Health Committee on Human Resources, 95th Cong., 2d Sess. (1978), Quoted in Coal Law & Regulation Vol. 1 Mine Safety and Health (1990), Timothy M. Biddle, Crowell & Moring, Washington, D.C.

tory review scheme deprives the Commission of the opportunity to apply its expertise and thwarts Congressional intent.

The Commission, on several occasions, has addressed constitutional issues that have arisen under the Mine Act. For example, in *Kenny Richardson*, 3 FMSHRC 8 (1981), a case cited by the Tenth Circuit, the Commission construed its authority to allow it to determine the constitutionality of the statute's criminal penalty provisions.[11] Thus the willingness of the Commission to address constitutional concerns is consistent with its statutory obligation to interpret the Mine Act.

The Amici NCA and AMC incorrectly read *Kaiser Coal Corporation v. Secretary of Labor*, 10 FMSHRC 1165 (1988), as standing for the proposition that the Commission will not consider constitutional challenges to provisions of the Mine Act. (Amici brief at 14-15.) They argue that the Commission's description of § 113(d)(1) of the Mine Act, 30 U.S.C. § 823(d)(1), in *Kaiser* as procedural somehow undermined the Commission's reliance on that provision in the *Kenny Richardson* case. In *Kaiser*, however, the Commission merely rejected the mine operator's efforts to use language in § 113(d)(1) as a basis for bringing an action (for declaratory relief) in a

[11] *Kenny Richardson*, 3 FMSHRC 8 (1981), *aff'd sub nom. Richardson v. Secretary of Labor*, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983); *see, also Gooslin v. Kentucky Carbon Corp.*, 3 FMSHRC 1707 (1981) (holding Commission's Rule 44 in violation of Fifth Amendment); *New York Dep't of Transp.*, 2 FMSHRC 1765 (1980) (ALJ Laurenson) (holding that application of the 1977 Act against state does not violate the Tenth Amendment); *see also Alabama By-Products Corp.*, 4 FMSHRC 2128 (1982) (holding that the Commission has jurisdiction to decide the constitutionality of provision of the 1977 Act and safety standards adopted under it); *Peabody Coal Co.*, 6 FMSHRC 183 (1984) (holding that search warrant under Fourth Amendment was not required by special investigator or records required to be kept by 1977 Act).

manner not otherwise authorized by the Mine Act. In discussing the effect of § 113(d)(1) the Commission stated that:

> ". . . this language describes the *scope* of the judge's [i.e., ALJ] authority to hear and decide matters in those proceedings otherwise properly filed pursuant to the Act." (emphasis supplied)

10 FMSHRC at 1169-1170. This makes clear that *Kaiser* is not a repudiation of *Kenny Richardson,* but rather a reaffirmation of it, since in the latter case the Commission held that under § 113(d)(1) the scope of the ALJ's and the Commission's authority would include the consideration of constitutional issues.[12]

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[12] In *Kaiser,* the operator had been given a citation for violation of a mandatory safety standard which it settled prior to hearing. As part of the settlement agreement Kaiser agreed to comply with certain conditions imposed by MSHA.

Simultaneously, Kaiser's petition for modification of the same mandatory safety standard for which they had been cited, was being considered by MSHA. MSHA granted the petition with certain conditions. Pursuant to § 101(d) of the Act, 30 U.S.C. § 811(d) which allows the miners' representative (or "other interested party"), to request a review, the UMWA requested review of the modification given to Kaiser and a hearing before an administrative law judge was scheduled. The UMWA moved for a continuance of the proceeding, without objection by Kaiser, and the ALJ continued the hearing indefinitely.

Rather than continuing to proceed under the petition for modification procedure, Kaiser filed with the Commission a pleading entitled "application for declaratory relief" in which it sought an order declaring the mandatory standard inapplicable to its mine. The ALJ determined, based on the Administrative Procedure Act, 5 U.S.C. § 554(e) and the Mine Act's § 113(d), that he had jurisdiction to hear Kaiser's application. 10 FMSHRC at 1169. On review, the Commission determined that the ALJ did not have jurisdiction to consider the application based on § 113(d) of the Mine Act. In so holding the Commission declined to permit Kaiser an avenue to circumvent the statutorily established procedures for invoking Commission jurisdiction:

> "Here, Kaiser chose to settle and to withdraw the prior section 105(d) contest proceeding in which the applicability of [belt air standard] . . . was at issue. Afterward, absent any extant enforcement action by the Secretary, Kaiser filed the present independent application for declaratory relief. Although the Commission had unquestioned jurisdiction over the prior contest proceeding, it is without jurisdiction over this application for declaratory relief."

10 FMSHRC at 1171.

Importantly the Commission did declare that it has authority under the § 105(d) enforcement proceedings to grant declaratory relief and that such relief was implicit in 105(d) for it authorized the Commission to "affirm, modify, or vacate the contested citation, order, or proposed penalty or direct 'other appropriate relief' ". 10 FMSHRC at 1171.

[13] *Cyprus Empire Corp. v. Secretary,* 15 FMSHRC 10 (1993) (Striking workers are not "miners" under the Mine Act's walk-

Petitioner contends that since it raises a constitutional issue, the Commission's expertise is irrelevant. This contention, however, ignores the fact that disputes such as this are contextual and cannot be decided in a vacuum without reference to the rights of the miners' representative (including the walkaround right) and their effect on promoting the health and safety of the employees who selected them. In *Bituminous Coal Operators v. Marshall,* 82 F.R.D. 350, (D.D.C. 1979) Judge Gesell, in dealing with a challenge to an interpretation of the walkaround provision stated:

> "Most of the issues raised in the instant action are typical of the questions which Congress wished the Commission to decide in the first instance. Moreover, as tendered here, they could be more effectively considered in light of some concrete factual circumstances . . ."

82 F.R.D. at 354. The Commission has a long history of considering cases dealing with the rights of miners' representatives, and the walkaround right is one which has been a source of frequent litigation and a subject to which the Commission has devoted a considerable amount of thought.[13]

By going directly to District Court to determine an issue that is within the Commission's expertise and has shown the ability to address, Thunder Basin circumvents the statutory procedure enacted by Congress to resolve these issues and deprives the Appellate Courts of the benefit of the Commission's expertise and analysis. This could subject the Secretary and the members of the mining community to the possibility of differing interpretations of the Mine Act by lower courts, thereby gutting Congress' intent to have one agency with the expertise adopt a uniform and comprehensive interpretation of the law.

Contrary to the impression created by the Petitioner and amici AMC and NCA, the Commission has not refused to consider any statute but the Mine Act. Indeed, in the course of deciding cases under the Mine Act, the Commission has frequently referred to other statutes for direction in consideration of similar issues under the Mine Act. For instance, in one of its early cases construing the scope of a miner's right to report hazards without suffering retaliation, (see, 30 U.S.C. § 815(c)),

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around provision and are not entitled to have a walkaround representative accompanying a MSHA inspector); *Emery Mining*, 10 FMSHRC 276 (1988), affirmed *sub nom, Utah Power & Light v. Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990) (Miners can designate a non-employee to be their representative under the Act); *Council of Southern Mountains, Inc. v. Martin County Coal Corp.*, 8 FMSHRC 206 (1984), affirmed *sub nom, Council of Southern Mountains, Inc. v. Federal Mine Safety & Health Review Commission*, 751 F.2d 1481 (D.C. Cir. 1985) (Section 103(f) of the Mine Act does not confer right on non-employee miners' representative to monitor training courses given at mine); *Magma Copper Co.*, 1 FMSHRC 1948 (1979) *affirmed in part, Magma Copper Co. v. Secretary of Labor*, 645 F.2d 694 (9th Cir. 1981), *cert. denied*, 454 U.S. 940 (1981). (More than one representative of the miners (who are employees) must be paid if an inspection consists of two or more MSHA inspectors going to different areas of the mine at the same time); *Kentland Elkhorn Coal Corp.*, 1 FMSHRC 1833 (1979) (Walkaround right limited to quarterly inspection of the entire mine) *reversed, United Mine Workers of America v. FMSHRC*, 671 F.2d 615 (D.C. Cir. 1982) *cert. denied*, 459 U.S. 927 (1982).

the Commission looked at employment discrimination law under Title VII of the Civil Rights Act of 1964 on the issue of how much weight to accord an arbitrator's finding; and they looked at constitutional and labor law cases for guidance in determining how to allocate burdens of proof in the mixed motive situation. *Secretary of Labor on behalf of David Parula v. Consolidation Coal Company*, 2 FMSHRC 2786 (1980).

More recently, the Commission had occasion to consider whether striking miners could designate a walkaround representative. The Commission conceded that "for purposes of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (1988) (NLRA), the strikers in this case were 'employees' of the [Operator] at the time of the inspection." The Commission ultimately determined, however, that the strikers did not meet the definition of miner contained in the Mine Act. *Cyprus Empire Corporation v. Secretary of Labor and United Mine Workers of America*, 15 FMSHRC 10 (1993).

Finally in *Kerr-McGee*, in which the operator asserted the same statutory conflict issue posited here, the Commission did not, as Petitioner suggests, ignore the NLRA in reaching its decision. The Commission did consider the Petitioner's NLRA argument, but once considered, rejected it and refused to defer to the NLRA or incorporate its provision into the Mine Act. Rather it interpreted the Mine Act so as to avoid any such conflict. *Kerr-McGee*, slip op. at 11-12.

CONCLUSION

The Mine Act's review provisions provide for a full and adequate hearing of Petitioner's claims in this case and evidence an intent, consistent with Congress' desire for prompt enforcement of the Act, to preclude preemptive strikes in district court even on constitutional and statutory conflict grounds. For all of the foregoing the judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

PATRICK K. NAKAMURA *
GEORGE N. DAVIES
LONGSHORE, NAKAMURA & QUINN
2100 First Avenue North
Suite 300
Birmingham, Alabama 35203
(205) 323-8504

ROBERT H. STROPP, JR.
MARY LU JORDAN
UNITED MINE WORKERS OF AMERICA
900 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 842-7330

Attorneys for Amicus Curiae United Mine Workers of America

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* Counsel of Record